(1)

No. 00-6677-CFH Title: Johnny Paul Penry, Petitioner
v.
CAPITAL CASE Gary L. Johnson, Director, Texas Department of Criminal Justice, Institutional Division

Docketed:
October 23, 2000 Court: United States Court of Appeals for the Fifth Circuit

Entry	Date	Proceedings and Orders
	Oct 20 2000	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due November 22, 2000)
	Oct 23 2000	Application (00A347) for a stay of execution, submitted to Justice Scalia.
	Oct 31 2000	Brief amici curiae of AAMR; Advocacy, Inc., et al. filed.
	Nov 1 2000	Brief of respondent Gary Johnson, Director in opposition filed.
	Nov 8 2000	Brief amicus curiae of The Bar Human Rights Committee of England and Wales filed.
	Nov 16 2000	Application (00A347) referred to the Court by Justice Scalia.
	Nov 16 2000	Application (00A347) granted by the Court.
	Nov 17 2000	REDISTRIBUTED for Conference of November 22, 2000
	Nov 27 2000	Petition GRANTED. SET FOR ARGUMENT March 27, 2001. **********
	Jan 11 2001	Brief amici curiae of International Association for Scientific Study, et al. filed.
	Jan 11 2001	Brief amici curiae of American Assn. on Mental Retardation, et al. filed.
	Jan 11 2001	Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
	Jan 11 2001	Joint appendix filed.
	Jan 11 2001	*Joint appendix in four volumes.
	Jan 11 2001	Brief of petitioner John Paul Penry filed.
	Jan 26 2001	CIRCULATED.
	Feb 8 2001	Record filed.
	Feb 14 2001	Brief amicus curiae of Criminal Justice Legal Foundation filed.
	Feb 15 2001	Brief of respondent Gary Johnson, Director filed.
	Feb 15 2001	Brief amicus curiae of Alabama filed.
	Feb 15 2001	Brief amicus curiae of Justice for All filed.
	Mar 2 2001	Motion of Alabama for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Mar 16 2001	Motion of Alabama for leave to participate in oral argument as amicus curiae and for divided argument DISTRIBUTED.
	Mar 16 2001	Motion of Alabama for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Mar 19 2001	Reply brief of petitioner John P. Penry filed.
	Mar 22 2001	Record filed.
	Mar 27 2001	ARGUED.

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No. 00-6677

In the Supreme Court of the United States

Supreme Court, U.S.
FILED
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JOHNNY PAUL PENRY,

Petitioner,

v.

GARY L. JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

**IMMINENT EXECUTION SCHEDULED
FOR NOVEMBER 16, 2000**

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CAPITAL CASE

QUESTIONS PRESENTED

1. Is the Court of Appeals decision, which approved the repetition of the same procedure condemned as unconstitutional in Penry I, in conflict with Penry I and other relevant decisions of this Court?

2. Is a psychiatrist appointed by the Court on motion of defense counsel, whose report is used as evidence for the prosecution, an "agent of the state" for purposes of the Fifth Amendment holding of Estelle v. Smith?

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Johnny Paul Penry respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Fifth Circuit affirming the denial of petitioner's application for a writ of habeas corpus and Judge Dennis's dissenting opinion are reported at 215 F.3d 504 and attached hereto as Appendix A. The opinion of the Court of Appeals denying Penry's petitions for rehearing and rehearing *en banc* is not reported and is attached hereto as Appendix C. The opinion of the United States District Court for the Southern District of Texas denying Penry's habeas petition is not reported and is attached hereto as Appendix B. The opinion of the district court denying Penry's motion to alter and amend the judgment can be found at Appendix D.

JURISDICTION

On June 20, 2000, the Court of Appeals entered judgment affirming the district court's denial of petitioner's application for habeas corpus. By order filed July 25, 1999, the Court of Appeals denied Penry's petitions for rehearing and rehearing *en banc*. See App. at C. This petition is being timely filed within 90 days of that order. This Court's jurisdiction rests on 28 U.S.C. § 1254(1). Petitioner first invoked federal court jurisdiction in this case under 28 U.S.C. § 2254.

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

This case involves the Fifth, Eighth and Fourteenth Amendments to the United States Constitution. The text of these Amendments is set forth in Appendix E. This

case also involves current and former Tex. Crim. Proc. Code Art. 37.071 and Tex. Crim. Proc. Code Art. 35.22. The text of these statutes can be found in Appendix L.

STATEMENT OF THE CASE

Summary of Issues Raised

This case involves the refusal of the Texas courts to abandon a practice condemned as unconstitutional in Penry v. Lynaugh, 492 U.S. 302 (1989) ("Penry I") because it put unacceptable limitations on the ability of a jury to give effect to mitigating evidence.

Penry I is the prior decision by this Court in this case, in which the Court held that the jury had been unconstitutionally precluded from giving effect to evidence of Penry's mental retardation and organic brain damage, and of the horrifying abuse he suffered as a child. Specifically, the Court held that the then existing Texas statutory scheme, which limited the consideration of mitigating evidence to the context of three "special issues," produced an unconstitutional result when applied to Penry.

On retrial, the Texas court, in violation of Penry I, submitted the same three special issues to the jury, giving the jury no opportunity, except through answers to the special issues, to give effect to the mitigating evidence.[1]

---

[1] As a result of Penry I, the Texas statutory scheme has been changed. A capital jury must now answer an additional "special issue" that expressly addresses mitigating evidence. At Penry's second trial, however, the new statute was not yet in effect. See App. L, Tex. Crim. Proc. Code Art. 37.071.

While Penry's jurors were instructed to consider that evidence, they were told they could only do so when answering the three special issues that Penry I held constitutionally inappropriate. Penry's jurors were given the following instruction:

> If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability *at the time you answer the special issue*. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, *as reflected by a negative finding to the issue under consideration*, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, *a negative finding should be given to one of the three special questions*.

Therefore, the jurors were instructed, in violation of Penry I, that they could only give effect to the mitigating evidence, and grant Penry a life sentence, if they found that the evidence of Penry's history of mental retardation and child abuse somehow fit under the three special questions. The only other way for the jurors to have given effect to this evidence would have been for them to disregard their oaths as jurors and answer "no" to one of the special issues even if the evidence supported an answer of "yes." This charge does not satisfy the requirements of the Eighth and Fourteenth Amendments to the Constitution and, therefore, is blatantly unconstitutional under Penry I.

Because of Penry, all capital defendants in Texas now have the benefit of a "Penry" instruction. Yet, Penry himself was deprived of such an instruction at his own re-trial. Penry appears before this Court to vindicate his constitutional right to have a jury give effect to those aspects of his character and background that would spare him from the ultimate punishment.

The jury charge was not the only error of constitutional magnitude at Penry's trial; the trial was infected by a psychiatric report admitted in blatant violation of Penry's rights under Estelle v. Smith, 451 U.S. 454 (1981). Several years before the trial in this matter, while Penry was in custody for an unrelated crime, he was subjected to a court-ordered psychiatric examination. Penry was not in custody for a capital offense at that time, and thus did not receive the constitutionally mandated warnings concerning the possible use of his statements against him at the penalty phase of a future trial for his life. Despite this, and over strenuous defense objections, this report was admitted into evidence, and heavily relied on by the prosecution, at his capital trial as proof of "future dangerousness." This use of Penry's statements was a clear violation of the Fifth Amendment as interpreted in Estelle.

These facts raise serious constitutional questions that merit this Court's consideration.

Procedural Background

After his original death sentence was vacated by this Court in Penry I, Penry was retried in 1990 in Walker County, Texas. On July 9, 1990, a jury found Penry guilty of capital murder. He was sentenced to death on July 17, 1990. Appeal was automatic to the Texas Court of Criminal Appeals, which affirmed the conviction and sentence on February 22, 1995 and denied rehearing on June 7, 1995. Penry v. State, 903 S.W.2d 715 (Tex. Crim App. 1995). The Supreme Court denied Penry's petition for a writ of certiorari on November 13, 1995, Penry v. Texas, 516 U.S. 977 (1995), and denied a motion for rehearing on January 8, 1996. Penry v. Texas, 516 U.S. 1069 (1996).

On October 23, 1996, Penry filed his initial Application for a Writ of Habeas Corpus with the 258th district court of Polk Count which was denied on September 23, 1997. The Texas Court of Criminal Appeals denied relief without opinion on December 3, 1997.

On March 2, 1998 Penry first sought federal jurisdiction by filing a Petition for a Writ of Habeas Corpus in the district court pursuant to 28 U.S.C. § 2254. The State filed a motion for Summary Judgment on March 16, 1998 which Penry opposed on April 7, 1998. On March 30, 1999, the district court denied the petition and denied Penry a Certificate of Appealability. On April 9, 1999 Penry filed a Motion to Alter and Amend the Judgment which was denied on August 13, 1999.

On November 8, Penry filed an Application for a Certificate of Appealability in the United States Court of Appeals for the Fifth Circuit that raised four issues for review. Oral argument was heard on February 10, 2000. The Application was denied and the opinion of the district court affirmed on June 20, 2000. On July 5, 2000, Penry filed Petitions for Panel Rehearing and Rehearing *en banc*, both of which were denied on July 25, 2000.

REASONS FOR GRANTING THE PETITION

I.

THE OPINION OF THE COURT OF APPEALS APPROVES THE ERROR CONDEMNED IN *PENRY I*

The Fifth Circuit decided the question before it "in a way that conflicts with relevant decisions of this Court." SUP. CT. R. 10(c). Specifically, the opinion of the Panel majority conflicts with Penry I, and the decisions on which it was based, including Hitchcock v. Dugger, 481 U.S. 393, 394 (1987), Skipper v. South Carolina, 476 U.S. 1, 4 (1986), Eddings v. Oklahoma, 455 U.S. 104, 113-114 (1982), Lockett v. Ohio, 438 U.S. 586, 604 (1978). These decisions all stand for the basic principle that "the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." Weeks v. Angelone, ___ U.S. ___ 120 S. Ct. 727, 732 (2000).

The decision below demonstrates a need for this Court to reaffirm the holding of Penry I that, while a court may structure a jury's consideration of mitigation evidence, it may not restrict the jury's ability to give effect to such evidence.

A. The Trial Court's Instruction Contained the Same Constitutional Infirmity that Required Reversal by this Court in Penry I.

1. Penry I

In 1989, this Court held in Penry I that the Texas capital sentencing regime limited the ability of the jury at Penry's trial to give effect to only that mitigating evidence that was relevant to the three "special questions" then in effect under Texas' capital statute.[2/]

[2/] The Texas State Legislature, in response to the Supreme Court's decision in Penry I, re-wrote the capital statute, but not in time for Penry's re-trial. Today, Texas capital jurors are asked (continued...)

The problem, as this Court articulated it, was that jurors were not able under the Texas regime to give effect to powerful mitigating evidence such as the defendant's mental retardation and history of child abuse because the statute focused their sentencing decision away from these considerations.

In determining whether a defendant should live or die, the Texas statute in effect at Penry's first -- and second -- trial asked jurors to answer three questions:

> i) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with reasonable expectation that the death of the deceased or another would result;
>
> ii) whether there is a reasonable probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> iii) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Tex. Crim. Proc. Code Art. 37.071, App. L.

Factors such as mental retardation and child abuse are not relevant to, and thus can not be considered under, these three questions. As this Court explained, evidence of mental retardation and severe child abuse are "beyond the scope of [the first special issue]" (concerning the defendant's deliberateness); are relevant to the second special issue

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[2/] (...continued)
four, not three, questions, and the fourth question pertains directly to mitigation. It asks "whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is still sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed." Tex. Crim. Proc. Code Art. 37.071 (Vernon Supp. 2000). This is the precisely the sort of instruction to which Penry was constitutionally entitled.

(concerning future dangerousness) only as an *aggravating* factor, and they simply have no bearing on the third special issue (victim's provocation). Penry I, 492 U.S. at 322-25. This Court thus concluded in Penry I that confining the jury's ability to dispense mercy based on negative answers to these three questions unconstitutionally prevents the jury from giving effect to powerful testimony that could otherwise save a defendant's life. On this ground, Penry's first death sentence was reversed.[3]

2. The Instruction at Penry's Second Trial Repeated the Error That Mandated Reversal in Penry I.

Notwithstanding this Court's clear holding in Penry I, the court that re-tried Penry following reversal did not correct the constitutional violation that generated the retrial. Rather, the jurors were once again unconstitutionally instructed that their consideration of the mitigating evidence must be limited to the three special questions. The trial court instructed the jury as follows:

> If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability *at the time you answer the special issue*. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, *as reflected by a negative finding to the issue under consideration*, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, *a negative finding should be given to one of the three special questions*.

The jury then retired to deliberate with a verdict form consisting of only the three special questions -- a form identical to the one found unconstitutional in Penry I.

The jury charge and verdict form given by the trial court fall prey to the same constitutional infirmity as the instructions that mandated reversal by this Court in Penry I. Three times the instruction draws the jurors back to the same special questions that this Court unequivocally held would not allow consideration of mental retardation and child abuse as mitigating factors. The charge tells the jury that the mitigation testimony should be considered "at the time you answer the special issue" -- something that this Court expressly held was impossible. Then, most pointedly, the instruction tells jurors that in order to determine whether "a life sentence" is "an appropriate response to the personal culpability of the defendant," the life sentence must be "*reflected by a negative finding*" to one of the three questions. Once more, the trial court's charge asked the jury to circumscribe their consideration of mental retardation and other mitigating evidence to the determination of the three special issues. The trial court did so, even though this Court explicitly held in Penry I that mental retardation and child abuse simply had no bearing on the questions presented to them, or if they did at all, it was as an *aggravating* factor.[4]

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[3] The Court's holding in Penry I was, as the Penry I Court stated, not novel or surprising. The Court held that it represented the logical and necessary enforcement of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982) which provide that a sentencer in a capital case must "not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." Lockett, 438 U.S. at 604; see Penry I, 492 U.S. at 319 (explaining that its holding created no new rule and was "dictated by Eddings and Lockett.").

[4] See, e.g., Rios v. State, 846 S.W.2d 310, 317 (Tex. Crim. App.1992) (*en banc*) ("Without more explanation, an instruction that baldly tells the jury it may consider evidence to be mitigating that seems either altogether irrelevant to the special issues, or relevant only in an aggravating sense, is likely in the context of [the Texas] scheme to confound rather than inform.").

This language brings the Penry violation around full-circle to what it was in Penry I. If, according to the court's instruction, a life sentence is only appropriate if there is a "negative finding to the issue under consideration," then Penry might as well not have had a Penry instruction, because the instruction only allows the jury to grant a life sentence if the honest answer to one of the three special questions is "no." That was always the case before Penry I. This is a direct violation of Penry I because Penry I quite clearly stands for the proposition that mental retardation evidence cannot be given mitigating effect under the three special issues. Again, just as the first time, there was no "vehicle," under the court's charge, for the jury to "express[] its 'reasoned moral response'" to the mitigating evidence. See Penry I, 492 U.S. at 328.

3. The Court of Appeals Failed to Recognize the Fundamental Flaw in the Instructions at Penry's Second Trial

The Court of Appeals for the Fifth Circuit held that the "instruction directed the jury to consider and give effect to any mitigating circumstances supported by the evidence by answering 'no' to one of the special issues if they felt a life sentence was appropriate."[2] App. A at 6. The Court of Appeals recognized, however, that the instruction "required the jury to give a negative answer to one of the three special issues in order for Penry to receive a life sentence." Id. (emphasis added).

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[2] In so holding, the Court of Appeals relied upon its decisions in Miller v. Johnson, 200 F.3d 274 (5th Cir.), cert. denied, __ S. Ct. __, 2000 WL 798485 (Oct. 2, 2000) and Emery v. Johnson, 139 F. 3d 191 (5th Cir. 1997), cert. denied, 119 S. Ct. 418 (1998). The cases relied upon by the majority are distinguishable for the reasons stated by Judge Dennis in his dissent. See App. A at 5.

The fundamental flaw with the reasoning of the majority is its failure to recognize that the instruction did not to allow the jurors to consider mitigating evidence beyond the scope of the three special issues. Therefore, the instruction contained the same constitutional infirmity as the instruction that required reversal by this Court in 1989.

> These instructions require the jury to consider and use only mitigating evidence relevant to the special issues, and permit the jury to decline to impose the death penalty only if that relevant mitigating evidence would cause the jury to change a "yes" to a "no." Therefore, the sentencing scheme used in Penry's second trial is subject to the same flaws pointed out by *Penry I*. It does not permit the jury to give effect to the mitigating evidence of retardation and abuse as a whole and beyond the scope of the special issues by declining to impose the death penalty despite its findings of "yes" to the three special issue questions. The jury's consideration of the mitigating evidence of mental retardation, organic brain damage and extensive child abuse is still shackled and confined within the scope of the three special issues. Therefore, the trial court failed to comply with the dictates of the Supreme Court and again deprived the jury of the ability to give full and complete effect to Penry's mitigating evidence of mental retardation, brain damage and child abuse.

App. A at 3-4 (Dennis, J., dissenting) (emphasis added).

B. This Court's Precedents Require Reversal Because There is a Reasonable Likelihood that the Jury Was Prevented from Considering Constitutionally Relevant Evidence

In determining if the instruction given at Penry's trial impermissibly restricted the jury's consideration of Penry's history of mental retardation and severe child abuse, this Court must determine "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant

evidence." Boyde v. California, 494 U.S. 370, 380 (1990). It has long been established that "[i]n death cases, doubts such as those presented here should be resolved in favor of the accused." Mills v. Maryland, 486 U.S. 367, 377 (1988), quoting, Andres v. United States, 333 U.S. 740, 752 (1948).

1. A Capital Jury May Not Be Precluded in Any Way from Considering Relevant Mitigating Evidence

This Court has consistently reaffirmed the fundamental principle that, in a capital case, "the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." Weeks v. Angelone, ___ U.S. ___, 120 S. Ct. 727, 732 (2000); see also, Hitchcock v. Dugger, 481 U.S. 393, 394 (1987), Skipper v. South Carolina, 476 U.S. 1, 4 (1986), Eddings v. Oklahoma, 455 U.S. 104, 114 (1982), Lockett v. Ohio, 438 U.S. 586, 604 (1978). While the "State may structure the jury's consideration of mitigation" it may "not preclude the jury from giving effect to it." Weeks, 120 S. Ct. at 732.

This Court has held that the Constitution permits states to institute jury instructions that "shape and structure" a capital jury's consideration of mitigating evidence. Buchanan v. Angelone, 522 U.S. 269, 276 (1998). This "shaping and structuring" may not, however, impede the jury's consideration of mitigating evidence in any way. This Court's "consistent concern has been that restrictions on the jury's sentencing determination not preclude the jury from being able to give effect to mitigating evidence." Id. Therefore, there is a "need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination." Id, citing, Tuilaepa v. California, 512 U.S. 967, 971-73 (1994). Anything

less "does not permit the type of individualized consideration of mitigating factors . . . required by the Eighth and Fourteenth Amendments in capital cases." Lockett, 438 U.S. at 605.

The instruction given at Penry's trial crossed the line between permissible "structuring" of the jury's ability to consider mitigating evidence and unconstitutional "restriction" of the jury's ability to consider such evidence. By tethering the jury's ability to give effect to the substantial mitigating evidence presented to the three special issues, the trial court unconstitutionally restricted the jury's ability to give effect to Penry's history of mental retardation and severe child abuse. Evidence of this type is unquestionably "'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death.'" Skipper, 476 U.S. at 4-5, quoting, Lockett, 438 U.S. at 604.

2. This Court's Recent Decisions Upholding Jury Instructions Demonstrate Precisely Why The Instruction Here Requires Reversal

Jury instructions approved by this Court in recent cases illustrate the constitutional infirmity in the instruction at issue here. In Buchanan, *supra*, the approved instruction told the jurors in plain language: "if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment." Buchanan, 522 U.S. at 272-73, see also, Id. at 273 n.1.[9] This Court approved this instruction because it "did not foreclose the jury's consideration of any mitigating evidence. By directing the jury to base its decision on 'all the evidence' the instruction afforded jurors an

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[9] In Buchanan this Court held that the Eighth Amendment does not require the court "to instruct the jury on its obligation and authority to consider mitigating evidence, and on particular mitigating factors deemed relevant by the State." 522 U.S. at 276.

opportunity to consider mitigating evidence." Id. at 277. This Court stated that "in contrast to the Texas special issues scheme in question in Penry, the instructions here did not constrain the manner in which the jury was able to give effect to mitigation." Id. (emphasis added, citation omitted).

By instructing Penry's jury that they could only "giv[e] effect to the mitigating evidence" if a life sentence was "reflected by a *negative finding to the [special] issue under consideration*" the trial court impermissibly "constrain[ed] the manner in which the jury was able to give effect to mitigation." Buchanan, 522 U.S. at 277. The constitutional infirmity in the Texas capital sentencing scheme pointed to by the Buchanan Court was not remedied by the trial court's instruction. In stark contrast to the instruction in Buchanan, which specifically told the jury to consider "all the evidence," Penry's jury was told that they could only give effect to mitigating evidence if "it was reflected by a negative finding to the issue under consideration." By so instructing the jury, the trial court did not cure the error that mandated reversal in Penry I, it exacerbated it, by expressly stating that the jury could not consider evidence not relevant to the three special issues. "[I]t was as if the trial judge had instructed [the] jury to disregard" a large part of the "mitigating evidence [Penry] proffered on his behalf." Eddings v. Oklahoma, 455 U.S. at 114.

In Weeks v. Angelone, *supra*, this Court again addressed the sentencing scheme at issue in Buchanan.[2] In addition to the instructions in Buchanan, the Weeks jury

[2] The issue in Weeks was "whether the Constitution is violated when a trial judge directs a capital jury's attention to a specific paragraph of a constitutionally sufficient instruction in response to a question regarding the proper consideration of mitigating circumstances." 120 S. Ct. at 729. This Court held that such a response by the trial judge does not violate the Constitution.

was told: "You must consider a mitigating circumstance if you find that there is evidence to support it." Weeks, 120 S. Ct. at 732 and 732 n.2. This Court relied upon the fact that the Weeks jury "received an explicit direction to consider mitigating evidence" in affirming the death sentence. Id. at 732. Rather than receiving an "an explicit direction to consider mitigating evidence," Penry's jury received an "explicit direction" that limited their consideration of mitigating evidence. Just as the "adequacy of the jury instructions" in Weeks "follow[ed] *a fortiori* from Buchanan," the inadequacy of the instructions here follows *a fortiori* from Penry I, Hitchcock, Skipper, Eddings and Lockett. Weeks, 120 S. Ct. at 732.

3. Mental Retardation is a Unique Mitigating Factor

Mental retardation is a unique mitigating factor in that it corresponds directly to a defendant's capacity to understand and control his behavior.[1] Society recognizes that mental retardation may diminish a defendant's moral blameworthiness. The Federal Government and eleven states currently have statutory prohibitions against the execution of the mentally retarded and three more states are currently working on similar statutes. Studies analyzing the behavior of juries show that since the reinstatement of the death penalty in 1976, relatively few mentally retarded defendants have been sentenced to death, and among those, the overwhelming majority of sentencing juries were not aware of the

[1] A brief on behalf of Amicus Curiae American Association on Mental Retardation *et al* will be filed describing the precise way in which mental retardation affects a person's ability to understand and control his behavior.

defendant's mental retardation.[9] In a number of these cases, prosecutors and sentencing jurors who subsequently learned about a particular defendant's mental retardation later indicated that they would not have sought or recommended the death penalty if they had full knowledge of the defendant's mental condition.[10] Data from the Capital Jury Project similarly reveal that juries in capital cases are almost twice as likely to return verdicts *against* the death penalty when the defendant is known to be mentally retarded.[11]

Hence the significance of Penry's mental retardation is enhanced because of overwhelming evidence demonstrating that he suffered the most horrific child abuse imaginable. Penry's mother believed that he was illegitimate and from the moment he was born she exhibited violent, venomous hatred towards him. Witnesses at the penalty phase of Penry's testified that they has witnessed a very young Penry suffer unspeakable abuse at the hands of his mother. Belinda Anderson, one of Penry's sisters, testified that Johnny was often "locked in his room" for periods of time "[f]rom eight hours on up." App. F at 1083. "About five days a week," Penry "would go without supper." Id. at 1084. Penry's mother "was ashamed of him, like she didn't love him or something, you know . . . she called him short little bastard, and mother-fucker and all kinds of filthy words" in a "hateful" tone of voice. Id. at 1086.

To Penry, being beaten by his mother "was practically an everyday affair." Id. As his sister stated: "It was a beating. Belt buckles, belts, it didn't matter, brooms, toy

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[9] Denis Keyes, William Edwards and Robert Perske, People with Mental Retardation are Dying, Legally, MENTAL RETARDATION, Feb. 1997 at 59.

[10] See id. at 61,62.

[11] See Report of the Capital Jury Project, at 2 & table 3 (Apr. 1997).

brooms, sticks and mop sticks, and anything she could lay her hands on, or her feet, stomp on him and stuff." Id. If Penry "look[ed] at [his mother] wrong or something[,] she would just threaten to scratch his little eyeballs out." Id. The beatings were triggered by "[a]nything. She could be drinking, could look at her wrong and didn't matter, he would say I love you, Mommy, Anything." Id. at 1087.

Penry's sister recounted the following story:

> Mama went into Johnny's room and Johnny had wet the bed again and Mama started running hot bath water, and you could see the steam rising up out of the shower. She drug him by the nape of his neck, like a little dog, by the shirt, back of his shirt, and she threw him in the bathtub and she held his head down with his face in the drain, saying, I ought to just drowned you, you little bastard.

Id. at 1088. She also remembered when Penry was forced to drink his own urine and eat his own feces:

> [H]e had to go and "pp" and he was banging on the door, wanting out to go to the bathroom. . .I think he was about five or six . . . But, it woke Mama up, him banging on the door, and Mama came in there, and he said, Mama I have got to "pp" and I am thirsty. So, she made him "pp" in the toilet and she made me go in there and watch. . . . She told Trudy to get her a cup, and she went and got it. I can't remember exactly how she came in, came in with the cup, but, she dipped it in the commode and made him drink it and she said that's all your getting for today, so, you better make it last. . . . She filled [the cup] up to the rim . . . I saw him drink it.
>
> [When] he was about four or five . . . I had just had a nightmare and I wanted to crawl in bed with Mama, and Johnny was in the doorway, she was facing Johnny, with our heads up against the wall and she was facing Johnny in the doorway. . . He was kneeling on his knees . . . I walked by and I smelled a bad smell and I looked at Johnny and he was sitting there, he was on his knees eating his own bowel movement out of his drawers. . . .He was holding it and he

was looking everywhere but, in Mama's direction, he looked like he was really ashamed . . . She was sitting on the bed drinking a Dr. Pepper and watching him.

Id. at 1090-91.

Penry's other sister, Trudy Ross remembered similar incidents of unimaginable abuse inflicted on a small child:

> [W]hen . . . he was two, he was scolded [sic] in the sink, and then, there was another time, when he was about three or four, my mother made him stand on the sink in front of the heater, his legs facing the back of the heater, and I can remember blisters on the back of his legs. . . . I can remember being frightened and scared and Johnny screaming . . . She hit him with a belt, usually, the side with the buckle, and switches, anything that she could find, and slapped him, clawed him, hit him, and one time she broke a child's broom on him, she hit him with it. . . . [She] beat him often . . It seemed like he always had fresh marks on his back . . . I had witnessed her making him eat his own increment [sic] and also, drinking his own urine. . . . I can remember when we were out somewhere in the car and Johnny had used the restroom in a coke bottle, and she came out -- he was afraid to go outside of the car and do it, he was really afraid to do anything just, you know, what to do, he was always afraid, and she came out to the car, and she forced him to drink it, and she was real hateful and mean to him, and she even held the bottle and forced him to drink it. . . . I can remember my mother coming home, she was very enraged, she was home late . . . I remember her in there, and she was saying I was going to cut his privates off, so, you won't do this anymore, and she went and got a knife and was actually going to do it.

Id. at 1112 - 1119. Lucille Anderson, Penry's aunt, testified that Penry's mother "would sock him when he would be sitting in the high chair eating, right in the mouth. . . . [when Penry was] [j]ust a little baby in a high chair." Id. at 1165.

Studies and opinion polls have shown that the execution of the mentally retarded is viewed by the overwhelming majority of the population as immoral. These studies did not address persons who have endured the level of abuse detailed above in addition to being mentally retarded. Penry's jurors were not given a chance to give effect to their moral opposition to the execution of the mentally retarded or victims of devastating child abuse. As this Court noted in Penry I, mental retardation is relevant to the second special issue only as an aggravating factor. Penry I, 492 U.S. at 322-25. In light of the fact that the jurors were instructed that they could only give effect to the evidence of Penry's mental retardation and child abuse "at the time [they] answer[ed] the special issue," "there is a reasonable likelihood that the jury [ ] applied the challenged instruction in a way that prevent[ed] the consideration of constitutionally relevant evidence." Boyde, 494 U.S. at 380.

4. Mitigation Instructions May Not be Defined in Terms of Statutory Criteria

This Court has held that a jury instruction that ties the jury's consideration of mitigating evidence to factors enumerated in a statute is unconstitutional. In Hitchcock v. Dugger, 481 U.S. 393 (1987) this Court reversed a death sentence because "the sentencing judge assumed" that Florida law "prohibit[ed] the sentencing jury and judge from considering mitigating circumstances not specifically enumerated in the statute" and "instructed the jury accordingly." 481 U.S. at 396-97.[12] The instruction given to Penry's jury drew the jurors back to the special issues in three separate places. By limiting the jury's consideration of mitigating factors to only those factors relevant to the three, narrow, special

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[12] As here, the statute at issue was subsequently revised to allow the jury to consider all relevant mitigating evidence. Id. at 397.

issues, the instruction improperly prohibited the jury from considering mitigating factors not relevant to those issues. This Court's "cases hold that the exclusion of mitigating evidence of the sort at issue here renders the death sentence invalid." Id. at 399.[13]

C. An Instruction that Requires Jurors to Render an Untruthful Verdict in Order to Give Effect to Mitigating Evidence is Unconstitutional

The Court of Appeals held that Penry's jury was perfectly able, under the dictates of Penry I, to "give effect" to Penry's mitigating evidence: all they had to do was violate their oath as jurors and render a false verdict. App. A at 6. (jurors could "give effect to any mitigating circumstances supported by the evidence by answering 'no' to one of the special issues of they felt a life sentence was appropriate"). In other words, the trial court's confusing instruction may be read as saying that, to render a life verdict, the jury could answer any one of the special questions "no," even if the question legitimately and unambiguously called for a "yes." At best, this instruction left Penry's jury with a Hobson's choice: answer the questions truthfully -- and violate Penry's constitutional rights -- or disregard the questions on the verdict sheet -- and violate their oath as jurors.

Every juror in Texas is required to swear the following oath:

> You and each of you do solemnly swear that in the case of the State of Texas against the defendant, you will a *true* verdict render according to the law and the evidence, so help you God.

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[13] The mitigating evidence presented in Hitchcock included evidence that "as a child petitioner had the habit of inhaling gasoline fumes from automobile gas tanks; that he had once passed out after doing so; that thereafter his mind tended to wander; that petitioner had been one of seven children in a poor family that earned its living by picking cotton; that his father had died of cancer; and that petitioner had been a fond and affectionate uncle to the children of one of his brothers." 481 U.S. at 397.

Tex. Crim. Pro. Code Art. 35.22 (West 1997), App. L.

The jurors were never clearly told that they could ignore this oath -- and such an instruction, even if given, would not be constitutionally permissible. A jury must be able to spare a capital defendant's life without betraying its obligation to render a "true verdict."

In Roberts v. Louisiana, 428 U.S. 325, 335 (1976) this Court held that a similarly flawed instruction was a constitutionally inadequate vehicle for dispensing mercy. In Roberts, the jury was instructed to consider crimes other than first degree murder "even if there [was] not a scintilla of evidence to support the lesser verdicts." Roberts, 428 U.S. at 334. Similarly, Penry's jury was instructed to answer "no" to one of the special issues even if there was "not a scintilla of evidence" to support such an answer. As this Court held in Roberts:

> This responsive verdict procedure not only lacks standards to guide the jury in selecting among first-degree murderers, but it plainly invites the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate. There is an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to disregard the [law].

428 U.S. at 334-35. "The Eighth Amendment . . . simply cannot tolerate the reintroduction of a practice so thoroughly discredited." Id. at 336; see also Beck v. Alabama, 447 U.S. 625, 644 (1980) (jurors "should not be expected to make such lawless choices").

* * * * *

For all of the above reasons, Penry's death sentence is unconstitutional.

> The sentencing scheme and instructions adopted by Texas in Penry's second trial . . . do not satisfy the constitutional

> requirements described in *Penry I*. The jury was not clearly and directly instructed that it could consider and give effect to the mitigating evidence of Penry's mental retardation, organic brain damage and abused background as a whole and beyond the scope of the special issues by declining to impose the death penalty. Texas did not replace its sentencing scheme with one which puts "before the jury all sympathetic factors bearing upon the defendant's background and character, and the circumstances of the offense, so that the jury may decide without further guidance whether he 'lacked the moral culpability to be sentenced to death.'"

App. A at 3 (Dennis, J., dissenting), quoting, Penry I, (Scalia, J., concurring in part and dissenting in part). Because the jury's ability to give effect to the substantial mitigating evidence presented was "still shackled and confined within the scope of the three special issues," Penry's jury was deprived of "the ability to give full and complete effect to Penry's mitigating evidence of mental retardation, brain damage and child abuse." Id.

Penry, a mentally retarded man who endured the most horrific child abuse imaginable, "has been caught in a web spun of words and logic that, in the end, has deprived [him] of his constitutional rights, a deprivation that may cost him his life." May v. Collins, 904 F.2d 228, 234 (1990) (Reavley, J. and King, J., concurring). The decision of the Court of Appeals should be reversed.

II.

THE ADMISSION OF THE PEEBLES REPORT VIOLATED PENRY'S FIFTH AMENDMENT RIGHTS UNDER *ESTELLE* V. *SMITH*

A. The Peebles Report and Its Use at Penry's Trial

In 1977, while Penry was in custody on an unrelated rape charge, the court ordered that he be examined by a psychiatrist to determine his competence to stand trial. This examination was conducted by Dr. Peebles. Dr. Peebles' report was admitted into evidence at Penry's subsequent capital trial over defense objection on Fifth Amendment grounds. App. G at 1429-31. The report described the court-ordered competence examination Dr. Peebles had conducted of Penry in 1977. The report included a finding that Penry would be a danger in the future if released. See Peebles Report, App. K at 2, see also, App. J at 2946-47. Since Penry was not in custody on a capital charge, it is not possible that he received the constitutionally-mandated warnings concerning the possible use of this examination at the punishment phase of a future capital trial. Penry's statements to Dr. Peebles cannot therefore be deemed voluntary under Estelle v. Smith, 451 U.S. 454 (1981).

The Peebles report was a predominant theme of the prosecution's case. Not only was the report itself admitted into evidence; each of the three experts put forth by the state to testify as to Penry's future dangerousness relied upon it. The prosecutor believed the Peebles report to be so powerful that he relied on it in his closing argument to paint Penry as an incurably violent man:

> [Penry] was examined by Dr. Felix Pebbles [sic] who found that he was sane. He knew the difference between right and

> wrong, and he was competent to stand trial, but Dr. Pebbles [sic] went on and made an additional finding that was *really out of the ordinary, and I have never seen this in any kind of a report*, he just added it, he said that it is my further professional opinion, that if Johnny Paul Penry were released from custody, that *he would be dangerous to other persons*.

App. J at 1946-47 (emphasis added).

B The Holding of Estelle

In Estelle this Court held that the use of a defendant's compelled statements violated the Fifth Amendment. In that case, the defendant had been subjected to a court-ordered psychiatric examination for the purpose of determining his competency to stand trial. The results of the examination were later used against him at the sentencing phase of the defendant's capital trial by the state as evidence of his future dangerousness. This Court held that this testimony "violated [his] Fifth Amendment privilege against compelled self-incrimination because respondent was not advised before the pretrial psychiatric examination that he had a right to remain silent and that any statement he made could be used against him at a sentencing proceeding." Estelle, 451 U.S. at 461. Here, Penry's Fifth Amendment rights were similarly violated.

C. The Court of Appeals Erroneously Denied Penry's Claim that the Admission of the Peebles Report Violated His Fifth Amendment Rights on the Ground that the Fifth Amendment Did Not Apply Because Penry's Counsel Had Requested the Examination

The use of the Peebles report, over the defense's objection on Fifth Amendment grounds, was a clear violation of Penry's constitutional rights. In denying Penry's claim relating to the Peebles report, the Court of Appeals held:

> The Texas Court of Criminal Appeals found no Fifth Amendment violation because Penry's attorney had requested the examination, thus Dr. Peebles was acting as an agent of the defense, not of the state in conducting his examination. We cannot say that the court's conclusion was unreasonable or contrary to Supreme Court precedent.

App. A at 12-13.

This decision is, so far as we are aware, the first to hold that the protections of Estelle do not apply to competence examinations requested by the defense.

The Fifth Circuit itself and several other circuits had previously held to the contrary. In Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981), the Fifth Circuit held that where the psychiatrist "had been appointed by the state trial court to conduct the examination . . . the custodial interrogation was conducted *by an agent of the state*." Id. at 699 (emphasis added). The Battie court held further that:

> the fact that the defense requested the examination does not obviate the necessity for giving the Miranda warnings where the defense did not request such an examination on the question of future dangerousness. . . . The fact that defense counsel initially requested an examination to determine the petitioner's competency and sanity does not render Miranda inapplicable.

655 F.2d at 702-03. Other Courts of Appeals have followed the reasoning of the Fifth Circuit in Battie. See, Hargrave v. Wainright, 804 F.2d 1182, 1191 (11th Cir. 1986) (following Battie and stating that it is "irrelevant that it was petitioner who requested the competency examination conducted by Dr. Sylvester."), op. vacated and rehearing granted on other grounds, 809 F.2d 1182 (11th Cir. 1987); Pierre v. Shulsen, 802 F.2d 1282 (10th Cir. 1986) (discussing Estelle in context of competence examination conducted "at the request of [defendant's] trial counsel;" claim was held to be procedurally barred). District

Court precedent is to the same effect. Tuggle v. Thompson, 854 F. Supp. 1229, 1233, 1235, 1243 (W.D. Va. 1994) ("Petitioner's trial counsel [ ] filed a motion for the appointment of a mental health professional to examine the petitioner's sanity at the time of the offense and his competence to stand trial. The court granted this motion and ordered state mental health professionals to examine petitioner with respect to these two issues. . . . [T]he prosecutor called [the doctor] and he was permitted to testify at trial that there was a high probability that Tuggle would commit criminal acts of violence in the future. In his closing sentencing argument, the Commonwealth's Attorney relied heavily on [the doctor's] testimony. . . . Just as in Estelle v. Smith, [defense counsel] had no knowledge of the state's intent to trap their client on the 'future dangerousness' issue . . . the petitioner's petition for writ of habeas corpus will be granted on this basis "), rev'd on other grounds, 57 F.3d 1356 (4th Cir.), vacated and remanded on other grounds, 516 U.S. 10 (1995).[14]

The Court of Appeals' holding that, where a competence examination was requested by defense counsel, the court-appointed psychiatrist is not an "agent of the state" is inconsistent with Estelle itself. In Estelle, this Court stated:

> That respondent was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant or prosecuting attorney is immaterial. When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting.

Estelle, 451 U.S. at 467 (emphasis added). It was the use of the doctor's testimony by the state that made him an agent of the state for Fifth Amendment purposes. The state's use of the Peebles report had the same effect here. Indeed, here, the Estelle error was compounded by the fact that Dr. Peebles did not testify, and only his report was admitted. Therefore, he was not subject to cross-examination by the defense.

This Court's decision in Smith v. Murray, 477 U.S. 527 (1986), also demonstrates the error of the Court of Appeals' holding. In Smith v. Murray, the petitioner had been "examined by a psychiatrist appointed by the court at the request of his counsel." 477 U.S. at 527. The psychiatrist testified against the petitioner at the sentencing phase of his capital trial. Id. While the majority held that the claim was procedurally barred, Justice Stevens, in dissenting on the procedural bar issue, stated that "Chief Justice Burger's opinion for the Court in Estelle v. Smith . . . makes it absolutely clear that the introduction of this evidence by the prosecution at the sentencing stage violated the Fifth Amendment." 477 U.S. at 551 (Stevens, J., dissenting, citation omitted). The fact that the examination had been requested by the defense was not mentioned by either the majority or the dissent. The clear implication of Smith is that the protections of Estelle apply to psychiatric examinations

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[14] On rehearing, Penry argued that the decision of the Court of Appeal was in conflict with circuit precedent. In denying the motion for rehearing, the Court of Appeals relied upon Schneider v. Lynaugh, 835 F.2d 570 (5th Cir. 1988). But Schneider was not a capital case and involved only the exception to Estelle upheld in Buchanan v. Kentucky, 483 U.S. 402 (1987). Buchanan held that "if a defendant requests [a psychiatric] evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. . . .; this limited rebuttal purpose does not constitute a Fifth Amendment violation." 483 U.S. at 422-24. The "rebuttal" exception to Estelle is not applicable to the Peebles report, which confirms the main thrust of Penry's plea for a life sentence -- that Penry is mentally retarded. The Court of Appeals did not hold that the Buchanan exception applied. See App. K at 2.

requested by the defense. The Court of Appeals' holding to the contrary is a departure from precedent that this Court should now correct.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

DECISION OF THE UNITED STATES COURT OF APPEALS

237 pp

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

U.S. COURT OF APPEALS
FILED
JUN 20 2000
CHARLES R. FULBRUGE III
CLERK

No. 99-20868

JOHNNY PAUL PENRY

Petitioner-Appellant,

VERSUS

GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas, Houston Division

Before DAVIS, EMILIO M. GARZA, and DENNIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

Penry filed a motion for a certificate of appealability (COA) in this § 2254 capital habeas proceeding, alleging various constitutional violations. For the reasons that follow, we deny his motion.

I.

Penry was convicted of capital murder and sentenced to death in Texas state court for the rape and murder of Pamela Carpenter. Penry raped Carpenter and stabbed her with a pair of scissors. He had met her several weeks earlier while helping to install appliances in her home. Penry matched the description Carpenter gave of her attacker before she died. After being given his Miranda warnings, Penry gave an oral confession and later a signed confession to the rape and murder. At trial, Penry offered mitigating evidence that he was mentally retarded and abused as a child. He was convicted and sentenced to death. The United States Supreme Court granted federal habeas relief and vacated his sentence, holding that Penry's rights were violated by jury instructions the trial court gave at the punishment phase of his trial.[1] The court found that none of the three special statutory questions provided to the jury, under Texas law, allowed the jury to give effect to Penry's mitigating evidence. "The jury was never instructed that it could consider the evidence offered by Penry as mitigating evidence and that it could give mitigating effect to that evidence." Penry I, 492 U.S. at 320; 109 S.Ct. at 2947.

In the second trial, the trial court followed the Texas statutory scheme and gave the jury the same three special questions it had given the jury in the first trial. However, the judge also provided supplemental instructions directing the jury to consider any other relevant mitigating evidence and explained how to give effect to that evidence. Penry was again convicted of capital murder and sentenced to death. The sentence was again affirmed on

[1] Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934 (1989) ("Penry I").

direct appeal[2] and state habeas relief was denied. The district court also denied Penry's application for a COA. Penry now seeks a COA from this court. We granted Penry's motion for a stay of execution, in order to consider his motion for a COA.

II.

A COA may only issue if the petitioner makes a "substantial showing of the denial of a constitutional right."[3] This burden can be met if the issues presented "are debatable among jurists of reason; …a court could resolve the issues in a different manner; or …the questions are adequate to deserve encouragement to proceed further."[4]

A death sentence alone does not justify the automatic issuance of a COA, although it is a proper consideration.[5] Any doubts as to whether the COA should issue are to be resolved in the petitioner's favor.[6]

Penry's petition was filed after the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA). Thus, for questions of law or mixed questions of law and fact adjudicated on the merits in state court, we may grant federal habeas relief under

[2] Penry v. State, 903 S.W.2d 715 (Tex. Crim. App. 1995).

[3] 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 120 S.Ct. 1595, 1603 (2000); United States v. Kimler, 150 F.3d 429, 431 (5th Cir. 1998).

[4] Miller v. Johnson, 200 F.3d 274, 280 (5th Cir. 2000) (quoting Barefoot v. Estelle, 463 U.S. 880, 893 n.4, 103 S.Ct. 3383, 3394 n.4 (1983)); Hicks v. Johnson, 186 F.3d 634, 636 (5th Cir. 1999), cert denied 120 S.Ct. 976 (2000); see also Slack, 120 S.Ct. at 1603-4 (quoting Barefoot v. Estelle, 463 U.S. 880, 893 and n. 4, 103 S.Ct. 3383).

[5] Lamb v. Johnson, 179 F.3d 352, 356 (5th Cir. 1999), cert denied 120 S.Ct. 522 (1999).

[6] Id.

28 U.S.C. § 2254(d)(1) only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established [Supreme Court precedent]."[7] A state court decision is "contrary to" Supreme Court precedent if: (1) the state court's conclusion is "opposite to that reached by [the Supreme Court] on a question of law" or (2) the "state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent" and arrives at an opposite result. Williams v. Taylor, 2000 WL 385369, at *23 (U.S. Apr. 18, 2000). A state court unreasonably applies Supreme Court precedent if: (1) it unreasonably applies the correct legal rule to the facts of a particular case or (2) it "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Id. at *25. In deciding whether a state court's application was unreasonable, this court considers whether the application was "objectively unreasonable." Id. at *26. We now turn to Penry's specific arguments on appeal.

III.

Penry first argues that the jury instructions given during the punishment phase of his trial did not allow the jury to consider and give effect to mitigating evidence regarding his alleged mental retardation and severe child abuse; thus, the instructions violated

[7] See Miller, 200 F.3d at 280-81.

the Supreme Court's directive in Penry v. Lynaugh,[8] ("Penry I"). Penry explains that jurors could only give effect to his mitigating evidence, as the Supreme Court required in Penry I, and grant him a life sentence if they found that the evidence fit under one of the three special questions required by Texas law.[9] In Penry I, Penry's federal habeas challenge to his first trial and conviction, the Supreme Court found that, under the trial court's instruction, none of the three special statutory questions allowed the jury to give effect to Penry's mitigating evidence. At Penry's retrial, however, the trial court supplemented the instruction it gave in Penry I. The court instructed the jury to consider any mitigating circumstances supported by the evidence. The instruction stated, in part:

> [W]hen you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence…. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find…any mitigating circumstances…you must decide how much weight they deserve, if any, and…give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

Penry correctly contends that the instruction still required the jury to give a negative answer to one of the three special issues in order for Penry to receive a life sentence. Penry argues that because childhood abuse and mental retardation do not necessarily fit within the scope of any of the special issues, this instruction did not allow the jury to give effect to these mitigating circumstances. However, on direct appeal, the Texas Court of Criminal Appeals found that the instruction satisfied the requirements of Penry I, and allowed the jury to give effect to those mitigating circumstances.[10]

We agree with the district court that the Texas Court of Criminal Appeals' holding that the challenged instruction was constitutional was not an unreasonable application of clearly established law, namely Penry I. The instruction directed the jury to consider and give effect to any mitigating circumstances supported by the evidence by answering "no" to one of the special issues if they felt a life sentence was appropriate. This instruction satisfied the deficiency in the trial court's

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[8] 492 U.S. 302, 109 S.Ct. 2934 (1989).

[9] The three questions were: 1. Was the conduct of the defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result? 2. Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society? 3. Was the conduct of the defendant in killing the deceased unreasonable in response to the provocation, if any, by the deceased? Since Penry, the statute has been revised to add a fourth question concerning mitigation.

[10] Penry v. State, 903 S.W.2d 715, 765 (Tex. Crim. App. 1995).

instruction identified in Penry I: "[t]he jury was never instructed that it could consider the evidence offered by Penry as mitigating evidence and that it could give mitigating effect to that evidence in imposing sentence."[11]

We are not writing on a clean slate on this issue. This court approved identical jury instructions on this point in Miller[12] and Emery v. Johnson.[13] In Miller, we concluded that the defendant failed to show that the same instructions given by the trial court in this case violated Penry I. We rejected the argument that the jury was prevented from considering the mitigating evidence.[14] "Miller's jury, unlike Penry's, was instructed that it should consider mitigating evidence when deliberating on the special issues....[It] was instructed that if it determined when giving effect to the mitigating evidence, if any, that a life sentence rather than a death sentence was an appropriate response to Miller's personal culpability, a negative finding should be given to the special issue under consideration."[15]

In the alternative, Penry argues that the jury charge was a "nullification instruction" and was therefore unconstitutional insofar as it instructed jurors to violate their oaths by rendering an untruthful answer to one of the special issues if they wished to

[11] Penry, 492 U.S. at 320, 109 S.Ct. at 2947.
[12] 200 F.3d 274.
[13] 139 F.3d 191 (5th Cir. 1997), cert denied 119 S.Ct. 418 (1998).
[14] 200 F.3d at 290.
[15] Miller, 200 F.3d at 290.

give effect to the mitigating evidence presented in this case. We disagree. The jury was not told to disregard the law; rather, it was instructed on how to obey the law, as explained by the Supreme Court in Penry I.

IV.

Next, Penry argues that the admission of certain psychiatric testimony and evidence offered by the state at trial violated his Fifth and Sixth Amendment rights.

A.

Penry's Fifth Amendment challenge involves three categories of psychiatric testimony and evidence presented by the state: 1. the testimony of Dr. Fason admitted during the guilt/innocence phase of trial; 2. the testimony of Dr. Quijano admitted during the punishment phase of trial; and 3. the report of Dr. Peebles describing a court-ordered examination of Penry, which was admitted at the punishment phase of trial.

1.

Penry's primary challenge is to the testimony of Dr. Fason. Penry contends that Fason's testimony was based on his court-ordered competency examination of Penry, and that the state's use of the testimony to argue future dangerousness during the punishment phase violated Penry's rights under Estelle v. Smith.[16]

[16] 451 U.S. 454, 101 S.Ct. 1866 (1981). Estelle held that the defendant's Fifth Amendment right against compelled self-incrimination was violated because he was not told that any statements made during his competency exam could be used

More particularly, Penry argues that his Fifth Amendment privilege against compelled self-incrimination was violated because he was not advised before Dr. Fason's examination of his right to remain silent and that his statements could be used against him at the sentencing proceeding.

On direct appeal, the Texas Court of Criminal Appeals found that Dr. Fason's testimony fell within the Buchanan v. Kentucky[17] exception to Estelle. Under Buchanan, if a defendant presents psychiatric evidence, then the prosecution may present rebuttal psychiatric evidence without violating the Fifth Amendment.

Penry contends that, as applied to this case, proper rebuttal evidence under Buchanan is limited to evidence tending to prove that Penry is not mentally retarded, and that the state's evidence went beyond that scope. After a careful review of the record, we find that Fason's testimony did fall within the Buchanan exception.

At the guilt/innocence phase of trial, Penry offered various psychological records, including reports of his performance on a number of psychological and IQ tests. The records also included observations of his emotional status and social behavior. As demonstrated by the closing argument of Penry's attorney, one reason these records were introduced was to lay a predicate for an argument that Penry's confessions were not truly voluntary because

against him at the punishment phase on the issue of future dangerousness.

[17]483 U.S. 402, 107 S.Ct. 2906 (1987).

Penry is mentally retarded and thus submissive to authority figures. The evidence was also offered to support Penry's argument that his mental retardation made him less likely to act with the intent required for capital murder.

Dr. Fason's testimony was introduced to rebut these arguments. Fason testified that Penry had an antisocial personality disorder. He explained how that condition could affect Penry's IQ scores, and that it was possible that Penry was not mentally retarded. Also, he testified that someone with an antisocial personality disorder would usually not be easily led by others and would likely disrespect and rebel against authority. Fason did not discuss any statements made by Penry during Fason's examination, except whether Penry was able to identify his attorney at the interview. We disagree with Penry's characterization of Fason's testimony as a "sham rebuttal" by the state in order to introduce to the jury the idea that Penry was a "psychopath." Penry's defense centered around his diminished capacity -- his alleged mental retardation at the time of the offense -- and the idea that his mental status rendered his confessions involuntary. Therefore, we conclude that the Court of Criminal Appeals' determination that Fason's testimony was proper rebuttal under Buchanan is neither contrary to nor an unreasonable application of clearly established federal law.[18]

[18]See Vardas v. Estelle, 715 F.2d 206, 209-10 (5th Cir. 1983) (finding no violation of defendant's Fifth Amendment privilege because state psychiatrists' testimony was proper as rebuttal to defendant's insanity defense; psychiatrists

In addition to his challenge to Dr. Fason's guilt phase testimony, Penry also challenges the court's admission, at the punishment phase, of the testimony of Dr. Quijano and the report of Dr. Peebles as violating Estelle.

At the punishment phase, Penry called various relatives and neighbors who testified that they believed Penry was mentally retarded and abused as a child. He also called Dr. Randall Price, who had reviewed certain portions of Penry's medical records, and had also administered various psychological tests to Penry. Dr. Price concluded that Penry had a brain impairment and was mentally retarded, and that the mental retardation could have influenced his involvement in criminal activity. Although he admitted that Penry had an antisocial history, he stated that Penry "looks more like people with brain damage...than those with antisocial personality."

In rebuttal, the state called Doctors Quijano and Samenow and introduced into evidence a number of Penry's mental health records. Dr. Quijano conducted a court-ordered competency examination of Penry. He testified that Penry had an antisocial personality disorder which made him more likely to be violent in the future. However, he testified that he based his opinion only on Penry's medical records including evaluations by others, and not on his own examination of Penry. Thus, the Texas Court of Criminal Appeals

testified that defendant was not insane, but instead was a sociopath.).

found no Fifth Amendment violation. This finding was not contrary to nor an unreasonable application of clearly established federal law.[19]

The report of Dr. Peebles was admitted into evidence during the punishment phase, and was based on Dr. Peebles' 1977 examination of Penry prior to his trial on an unrelated rape charge. The report determined that Penry would be dangerous in the future if released. At the time of Dr. Peebles' examination, Penry was not yet in custody on the instant capital charge, and thus could not have been warned about the potential use of his statements at the punishment phase of the capital trial. The Texas Court of Criminal Appeals found no Fifth Amendment violation because Penry's attorney had requested the examination; thus, Dr. Peebles was acting as an agent of the defense, not of the state, in conducting his examination.[20] We cannot say that the court's conclusion was unreasonable or contrary to Supreme Court

[19] See Williams v. Lynaugh, 809 F.2d 1063, 1068 (5th Cir. 1987) (finding no factual basis for Fifth Amendment violation where state psychologist's testimony on future dangerousness was not based on his interview with the defendant.) See also Hughes v. Johnson, 191 F.3d 607, 616-17 (5th Cir. 1999) (finding reasonable a state court's conclusion that psychiatrist's testimony did not violate Estelle, despite his having conducted a prior improper interview, because it did not influence his testimony; also rejecting idea that "taint" of prior improper interview created absolute bar to any expression of opinion by that psychiatrist); cf. Flores v. Johnson, 2000 WL 426212, at *1, * 7 - *13 (5th Cir. April 20, 2000) (Emilio M. Garza, J., specially concurring) (following but questioning Supreme Court authority allowing psychiatric testimony on future dangerousness deduced without examining the defendant).

[20] Penry, 903 S.W.2d. at 759-60; see Nelson v. State, 848 S.W.2d 126, 135 (Tex. Crim. App. 1992); Estelle, 451 U.S. at 467-68, 101 S.Ct. at 1875-76 (noting that the defendant there did not initiate the examination and was not faced with a person acting solely in his interest).

precedent.[21]

B.

Penry also argues that his Sixth Amendment right to effective assistance of counsel was violated by the use of testimony on future dangerousness from Doctors Quijano and Fason because Penry and his counsel were told that their examinations of him were solely for the purpose of determining competency. Under Powell v. Texas, "once a capital defendant is formally charged, the Sixth Amendment right to counsel precludes such an examination without first notifying counsel that 'the psychiatric examination [will] encompass the issue of their client's future dangerousness.'"[22] The Texas Court of Criminal Appeals concluded that Penry's attorney was "on notice that if he intended to put on a 'mental status' defense, he would have to anticipate the use of psychological evidence by the prosecution in rebuttal."[23] At a pretrial hearing, the trial court expressly warned Penry's counsel that the testimony of Doctors Fason and Quijano might be admissible at trial if the

[21]See Buchanan v. Kentucky, 483 U.S. 402, 422-23, 107 S.Ct. 2906, 2917-18 (1987) (finding that "if a defendant requests [the psychiatric] evaluation or presents psychiatric evidence...the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution."). (Emphasis added); see also Schneider v. Lynaugh, 835 F.2d 570, 577 (5th Cir. 1988) (finding that, under Buchanan, the fact that defendant requested the competency examination militated against the defendant's assertion of the Fifth Amendment privilege, particularly when defendant had also introduced psychological evidence.).

[22]492 U.S. 680, 681, 109 S.Ct. 3146, 3148 (1989) (quoting Estelle, 451 U.S. at 471, 101 S.Ct. at 1877).

[23]Penry, 903 S.W.2d at 758.

defense put on psychiatric evidence.[24] At trial, Penry argued that he was mentally retarded; thus his confessions were involuntary. He also argued that mental retardation could have been a contributing cause of Penry's violent criminal acts and that his mental retardation mitigated against the imposition of the death penalty. The state was entitled to rebut this evidence by offering psychiatric evidence that some condition other than mental retardation was a more sound explanation for Penry's conduct. Thus, the Court of Criminal Appeals' findings are not contrary to, nor an unreasonable application of, clearly established federal law.

V.

Penry next contends that his execution would violate the Eighth Amendment, based on his alleged mental retardation and severe child abuse. First, Penry makes a general argument that execution of the mentally retarded is a per se violation of the Eighth Amendment. We agree with the district court that this claim is procedurally barred because Penry did not make the argument in state court. However, even if this claim was not procedurally barred, it has been rejected by the Supreme Court.[25]

Penry also argues that the death penalty would be cruel and

[24]Id. at 759, n. 46.

[25]See Andrews v. Collins, 21 F.3d 612, 632 (5th Cir. 1994), cert. denied 513 U.S. 1114, 115 S.Ct. 908 (1995) (citing Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934 (1989)).

unusual as applied to him personally, because of his mental retardation and severe childhood abuse. This argument also fails. On Penry's direct appeal, the Texas Court of Criminal Appeals (citing Penry I) concluded that constitutional requirements were met because the jury was able to consider and give effect to Penry's mitigating evidence before determining that the death sentence was appropriate.[26] In Penry's second trial, he presented extensive mitigating evidence and the jury was instructed to consider that evidence and told how to give it effect. More significantly, although Penry was the individual before the Supreme Court in Penry I, the Court did not suggest that his execution would be unconstitutional based on his mental retardation or childhood abuse. The Texas Court of Criminal Appeals' conclusion that Penry's execution would not violate the Eighth Amendment was neither contrary to nor an unreasonable application of clearly established Supreme Court precedent.

VI.

Penry makes several other arguments in support of his motion. He contends that: 1. the trial court violated his rights under Simmons v. South Carolina[27] by excluding his signed statement waiving any right to parole, while allowing the state to argue future dangerousness; 2. his confessions were taken involuntarily

[26]Penry, 903 S.W.2d at 766-67.
[27]512 U.S. 154, 114 S.Ct. 2187 (1994).

in violation of the Fifth Amendment; and 3. the jury instructions at his competency trial were unconstitutionally vague because they did not define the terms "reasonable," "rational," and "understanding." We find all of these arguments to be unpersuasive, essentially for the reasons given by the district court in its thorough opinion of March 29, 1999.

VII.

For the reasons stated above, we deny Penry's motion for a certificate of appealability. We also vacate the stay of execution previously entered by this court.

Dennis, J., dissenting:

In *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"), the Supreme Court held that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. "The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Id.* at 319. Accordingly, the jury must be "instructed that it could consider the evidence offered by Penry as mitigating evidence and that it could give mitigating effect to that evidence in imposing sentence." *Id.* at 320. The Court agreed with Penry "that his mitigating evidence of mental retardation and childhood abuse has relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its 'reasoned moral response' to that evidence in determining whether death was the appropriate punishment." *Id.* at 322.

Moreover, in *Penry I*, the Court stated that in the absence of a special jury instruction "defining 'deliberately' in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability...a juror who believed that Penry's retardation and background diminished his moral culpability and made imposition of the death penalty unwarranted would be unable to give effect to that conclusion if the juror also believed that Penry committed the crime 'deliberately.'" *Id.* at 323. Likewise, the Court observed, the mitigating evidence concerning Penry's mental retardation, which indicated his inability to learn from his mistakes, was relevant to the second issue only as an aggravating factor because it suggests a "yes" answer to the question of future dangerousness. *Id.* at 323. Consequently, the Court concluded, the second special issue "did not provide a vehicle for the jury to give mitigating effect to Penry's evidence of mental retardation and childhood abuse." *Id.* at 324. With respect to the third special issue, the Court stated, a juror who found that Penry's mental retardation and arrested emotional development rendered him less culpable for his crime than a normal adult would not necessarily

conclude that Penry's conduct was reasonable in response to the provocation, if any, by the deceased. "Thus", the Court reasoned, "a juror who believed Penry lacked the moral culpability to be sentenced to death could not express that view in answering the third special issue if she also concluded that Penry's action was not a reasonable response to provocation." *Id.* at 324-25.

In light of the prosecutor's argument to the jurors that, under their oath to follow the law, they must follow the instructions they were given in answering the special issues, the Court concluded that, "in the absence of appropriate jury instructions, a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." *Id.* at 326.

In *Penry I*, the State of Texas conceded at oral argument before the Supreme Court that if a juror concluded that Penry acted deliberately and was likely to be dangerous in the future, but also concluded that because of his mental retardation he was not sufficiently culpable to deserve the death penalty, that juror would be unable to give effect to that mitigating evidence under the instructions given in the case. *See id.* at 326. Finally, the Court held that "[i]n this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision." *Id.* at 328.

Justice Scalia, in his concurring and dissenting opinion in *Penry I*, criticized the majority's holding as follows:

> In providing for juries to consider all mitigating circumstances insofar as they bear upon (1) deliberateness, (2) future dangerousness, and (3) provocation, it seems to me Texas had adopted a rational scheme that meets the two concerns of our Eighth Amendment jurisprudence. The Court today demands that it be replaced, however,

> with a scheme that simply dumps before the jury all sympathetic factors bearing upon the defendant's background and character, and the circumstances of the offense, so that the jury may decide without further guidance whether he "lacked the moral culpability to be sentenced to death," *ante*, at 2950, "did not deserve to be sentenced to death," *ante*, at 2951, or "was not sufficiently culpable to deserve the death penalty," *ibid.* The Court seeks to dignify this by calling it a process that calls for a "reasoned moral response," *ante*, at 2949, 2951--but reason has nothing to do with it, the Court having eliminated the structure that required reason. It is an unguided, emotional "moral response" that the Court demands be allowed--an outpouring of personal reaction to all the circumstances of a defendant's life and personality, an unfocused sympathy.

Id. at 359-60 (Scalia, J., concurring in part and dissenting in part).

The sentencing scheme and instructions adopted by Texas in Penry's second trial, the subject of the present case, do not satisfy the constitutional requirements described in *Penry I*. The jury was not clearly and directly instructed that it could consider and give effect to the mitigating evidence of Penry's mental retardation, organic brain damage and abused background as a whole and beyond the scope of the special issues by declining to impose the death penalty. Texas did not replace its sentencing scheme with one which puts "before the jury all sympathetic factors bearing upon the defendant's background and character, and the circumstances of the offense, so that the jury may decide without further guidance whether he 'lacked the moral culpability to be sentenced to death[.]'" *Id.* at 360 (Scalia, J., concurring in part and dissenting in part). Instead, in the present case, the jury was instructed: "If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues." These instructions require the jury to consider and use only mitigating

evidence relevant to the special issues, and permit the jury to decline to impose the death penalty only if that relevant mitigating evidence would cause the jury to change a "yes" answer to a "no." Therefore, the sentencing scheme used in Penry's second trial is subject to the same flaws pointed out by *Penry I*. It does not permit the jury to give effect to the mitigating evidence of retardation and abuse as a whole and beyond the scope of the special issues by declining to impose the death penalty despite its findings of "yes" to the three special issues questions. The jury's consideration of the mitigating evidence of mental retardation, organic brain damage and extensive child abuse is still shackled and confined within the scope of the three special issues. Therefore, the trial court failed to comply with the dictates of the Supreme Court and again deprived the jury of the ability to give full and complete effect to Penry's mitigating evidence of mental retardation, brain damage and child abuse.

The Supreme Court in *Penry I* held that the jury was not adequately instructed to take into consideration all of Penry's mitigating evidence and that the terms in the Texas special issues were not defined in such a way that the jury could consider and give effect to all of his mitigating evidence in answering them. When the Court reversed and remanded for these reasons, the district court and this court became bound by the mandate rule. The mandate rule is not, strictly speaking, merely a matter of law of the case. *See United States v. Wells*, 519 U.S. 482, 488 n.4 (1997). On remand, the district court and the court of appeals owe obedience to the mandate of the Supreme Court and must carry it into effect. *See Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427-28 (1978) (once case is remanded, circuit court is bound by decree); MOORE'S FEDERAL PRACTICE 3D § 134.23[1][a].

Subsequently, the Supreme Court distinguished its holding from *Penry I* in cases involving other types of mitigating evidence. *See Johnson v. Texas*, 509 U.S. 350, 369 (1993) ("The evidence of petitioner's youth, however, falls outside Penry's ambit. Unlike Penry's mental retardation,

which rendered him unable to learn from his mistakes, the ill effects of youth that a defendant may experience are subject to change and, as a result, are readily comprehended as a mitigating factor in consideration of the second special issue."); *Graham v. Collins*, 506 U.S. 461, 475-76 (1993) ("The jury was not forbidden to accept the suggestion of Graham's lawyers that his brief spasm of criminal activity in May 1981 was properly viewed, in light of his youth, his background, and his character, as an aberration that was not likely to be repeated. Even if Graham's evidence, like Penry's, had significance beyond the scope of the first special issue, it is apparent that Graham's evidence – unlike Penry's – had mitigating relevance to the second special issue concerning his likely future dangerousness. Whereas Penry's evidence compelled an affirmative answer to that inquiry, despite its mitigating significance, Graham's evidence quite readily could have supported a negative answer."). Accordingly, we are still bound by the mandate and the holding of *Penry I* and must carry them into effect now in the present case.

Moreover, there is no circuit precedent which prevents this panel from owing obedience to the mandate and holding of *Penry I*. In our prior decisions, *Penry I* was not applicable because the proffered evidence either was not constitutionally mitigating evidence[1] or was not beyond the scope of the special issues or beyond the effective reach of the jurors,[2] or because the claim was procedurally barred.[3]

In *Graham v. Collins*, 950 F.2d 1009 (5th Cir. 1992) (en banc), this court explained that *Penry*

[1] *See Madden v. Collins*, 18 F.3d 304, 308 (5th Cir. 1994) (citing *Graham v. Collins*, 950 F.2d 1009, 1029 (5th Cir. 1992) (en banc)).

[2] *See Graham v. Collins*, 950 F.2d 1009, 1029 (5th Cir. 1992) (en banc); *Miller v. Johnson*, 200 F.3d 274, 289-90 (5th Cir. 2000).

[3] *See Emery v. Johnson*, 139 F.3d 191, 199-200 (5th Cir. 1997).

I presented a "wholly different type of mitigating evidence. ~~Not evidence~~ of good character, but of bad character; not evidence of potential for rehabilitation, but of its absence; not evidence of a transitory condition, but of a permanent one; but nonetheless evidence which was strongly mitigating because these characteristics were due to the uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own, mental retardation, organic brain damage and an abused childhood. There was no way this type of evidence could be given any mitigating force under the second special issue." *Id.* at 1029. This court in *Graham* observed that "*Penry* can fairly be read as precluding use of the Texas statutory scheme in any such situation. But, *Penry* can also fairly be read as addressing only a situation where some major mitigating thrust of the evidence is substantially beyond the scope of any of the [special] issues." *Id.* at 1027. Consequently, the use of the Texas statutory scheme was precluded in Penry's situation and this panel has a duty to carry into effect the mandate and holding of *Penry I*. For these reasons, I would grant Penry's application for a COA.

I would also grant a certificate of appealability to consider the alleged violations of Penry's 5th and 6th Amendment rights. I share the concerns articulated by Judge Emilio M. Garza's special concurrence in *Flores v. Johnson*, 210 F.3d 456, 458-70 (5th Cir. 2000) (Judge Emilio M. Garza, specially concurring) and believe that Penry has made a substantial showing that the cumulative effect and reinforcement of the prohibited use of the Texas statutory scheme by the erroneous admission of the psychiatric testimony further violated his constitutional rights.

APPENDIX B

DECISION OF THE UNITED STATES DISTRICT COURT

CLERK, U. S. D.
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MICHAEL N. MILBY, CLERK
BY DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED
MAR 30 1999
MICHAEL N. MILBY, Clerk

JOHNNY PAUL PENRY,	§	
	§	
Petitioner,	§	
	§	
VS.	§	CIVIL ACTION NO. H-97-4094
	§	
GARY L. JOHNSON,	§	
Director, Texas Department of	§	
Criminal Justice, Institutional Division,	§	
	§	
Respondent.	§	

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MEMORANDUM AND ORDER

Petitioner, Johnny Paul Penry, seeks a federal writ of habeas corpus under 28 U.S.C. § 2254 vacating his state capital murder conviction and death sentence. (Docket Entry No. 18). Respondent, Gary L. Johnson, Director, Texas Department of Criminal Justice—Institutional Division, has answered and moved for summary judgment. (Docket Entry No. 20). Penry has replied to respondent's motion for summary judgment; moved to strike respondent's motion for summary judgment; and cross-moved for summary judgment on several of his claims for relief. (Docket Entry Nos. 27 and 28).

Based on a careful review of the petition, the motions, the reply, the state court records, and the applicable law, this court GRANTS respondent's motion for summary judgment; DENIES Penry's motion to strike respondent's motion for summary judgment; and DENIES Penry's cross-motion for summary judgment. Based on these rulings, this court lifts the stay of execution, denies the petition for writ of habeas corpus, addresses the issuance of a certificate of appealability, and dismisses this case.

The reasons for these rulings are set out in detail below.

I. Procedural History

On November 7, 1979, the State of Texas indicted Penry for the capital murder of Pamela Carpenter. (Trans. Vol. 1, p. 1).[1] In 1980, after a transfer of venue on defendant's motion, and following a competency hearing, a jury tried Penry, convicted him of capital murder, and sentenced him to death. The Texas Court of Criminal Appeals affirmed Penry's conviction and sentence on direct appeal. *Penry v. State*, 691 S.W.2d 636 (Tex. Crim. App. 1985), *cert. denied sub nom., Penry v. Texas*, 106 S. Ct. 834 (1986). The Court of Criminal Appeals denied Penry's application for state habeas relief on May 5, 1986. The Eastern District of Texas and the Fifth Circuit denied Penry's federal petition for a writ of habeas corpus. *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987).

In 1989, the United States Supreme Court granted Penry's petition for habeas relief, ruling that the jury instructions in the sentencing phase of his trial did not allow the jury to consider and give effect to the mitigating evidence of Penry's mental retardation and history of childhood abuse. *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989)

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[1] The state court records of Penry's 1990 retrial consist of a five-volume transcript of pretrial motions, court orders, and other pleadings, cited as "Trans. Vol. ___, p. ___"; a fifty-two volume Statement of Facts, including hearings on pretrial motions, the suppression hearing, the competency hearing, the change of venue hearing, jury voir dire, the guilt/innocence proceedings, the sentencing proceedings, and the hearing on Penry's motion for new trial, cited as "S.F. Vol. ___, p. ___"; and a four-volume transcript of the state habeas proceedings, cited as "S.H. Vol. ___, p. ___." The parties have also submitted the Statement of Facts from Penry's 1980 suppression hearing and his 1980 trial.

("*Penry* I"). The Supreme Court held that the sentencing instructions deprived the jury of a "vehicle for expressing its 'reasoned moral response'" to the mitigating evidence Penry presented. *Id.* at 2952. Concluding that the sentence imposed did not result from the individualized determination required by "the fundamental respect for humanity underlying the Eighth Amendment," the Supreme Court vacated the conviction and sentence and remanded the case. *Id.* at 2945 (quoting *Woodson v. North Carolina*, 96 S. Ct. 2978, 2991 (1976)).

After a second competency hearing, the State of Texas retried Penry for capital murder ("*Penry* II").[2] The jury found Penry guilty of capital murder on July 9, 1990, and sentenced him to death on July 17, 1990. The Texas Court of Criminal Appeals affirmed Penry's conviction and sentence on direct appeal. *Penry v. State*, 903 S.W.2d 715 (Tex. Crim. App.), *cert. denied sub nom.*, *Penry v. Texas*, 116 S. Ct. 480 (1995). On October 17, 1996, Penry filed an application for state habeas relief. On July 3, 1997, the state district court held an evidentiary hearing on three of Penry's claims. On September 23, 1997, the state district court denied Penry's habeas

[2] The case was remanded to Trinity County, Texas, the location of Penry's first trial. The trial judge changed venue to Polk County, Texas, where Penry's indictment had issued. The trial court granted Penry's motion for a change from that venue, moving the trial to Walker County, Texas, but denied a subsequent motion to change venue. Penry's second trial took place in Walker County.

application. On December 3, 1997, the Texas Court of Criminal Appeals denied the habeas application, adopting the district court's recommendation.

On December 9, 1997, the state district court scheduled Penry's execution for May 13, 1998. On March 2, 1998, Penry filed a federal petition for writ of habeas corpus in this court. Penry asserts the following claims for relief:

I. The trial court failed to give the jury a vehicle for considering mitigating evidence concerning Penry's childhood abuse and mental retardation.

II. Penry's execution would violate his right to be free from cruel and unusual punishment because Penry is mentally retarded.

III. Penry's execution would violate the Eighth Amendment because there currently exists a national consensus against the execution of the mentally retarded.

IV. The trial court violated *Simmons v. South Carolina* by refusing to admit Penry's evidence regarding the unlikelihood of parole yet permitting the prosecutor to argue Penry's future dangerousness.

V. The trial court violated Penry's rights under *Estelle v. Smith* by admitting evidence derived from involuntary psychiatric examinations.

VI. The trial court violated Penry's constitutional rights by excluding evidence of Penry's mother's mental illness.

VII. The State violated Penry's constitutional rights by failing to administer his anti-psychotic medication during the competency hearing and by failing to correct inaccurate testimony regarding the nature and purpose of the medication.

VIII. Penry's execution after eighteen years on death row would violate his constitutional rights under the Eighth Amendment.

IX. Penry's *Miranda* rights were violated, rendering his confessions illegal and improperly admitted at trial.

X. The trial court violated Penry's rights under the Sixth and Fourteenth Amendments by refusing to change venue from Walker County.

XI. Penry's constitutional rights were violated by the prosecution's misstatement of the law during voir dire.

XII. The trial court's jury charge during the punishment stage violated Penry's constitutional rights.

XIII. Penry's competency hearing was constitutionally inadequate.

XIV. The trial court's admission of irrelevant hearsay evidence violated Penry's Fifth and Sixth Amendment rights.

XV. Texas's clemency procedures violate Penry's substantive and due process rights under the

Fourteenth Amendment and, therefore, violate Penry's rights under the Eighth Amendment.

On April 20, 1998, this court granted Penry's motion for a stay of his execution for the limited purpose of permitting full consideration of Penry's claims. Each of Penry's claims is addressed below.

II. Factual Background: The Record of *Penry* I and *Penry* II

On October 25, 1979, Pamela Carpenter telephoned a friend, Cynthia Peters, and told her friend that she had been raped and stabbed.[3] Peters drove to Carpenter's house in Livingston, Texas and found Carpenter, still alive, lying on a bed in her bedroom. Peters called the police.

Officer E.G. Paige of the Livingston Police Department arrived at Carpenter's house and talked to her. Carpenter did not know the identity of her attacker, but gave a description of a white male with black, curly hair, cut over the ears; slender and short; wearing a "reddish plaid shirt" with a "flowery design" and blue jeans. (S.F. Vol. 42, p. 174). Officer Paige noticed a pair of scissors and a pocketknife on the floor in front of Carpenter's bed.

Carpenter was taken to the hospital, where she again described the attacker in similar terms. Carpenter also stated that she did not know the attacker

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[3] The factual background, largely undisputed, is drawn from the prosecution's case-in-chief during the guilt/innocence phase of *Penry* II.

personally but had "seen him in the area." (S.F. Vol. 43, p. 264). Carpenter died at the hospital a short time later.

Billy Ray Nelson, a Polk County deputy sheriff, had heard a police radio report of the attack and a description of the attacker. Nelson thought the description matched Penry, whom he knew. Nelson drove to Penry's father's house in Livingston, Texas. Penry answered the door, wearing blue jeans without a shirt. Nelson told Penry briefly about the attack on Carpenter and asked Penry to come with him to the police station. Penry put on a shirt and Nelson drove him to the Livingston police station in the police car.

When Penry got out of the car at the station, Nelson and another officer in the car noticed blood soaking through the back of Penry's shirt. The officers asked Penry about the blood. Penry took off his shirt and showed the officers two puncture wounds below his right shoulder. Penry told the officers that he had received the wounds that morning when he had fallen off his bicycle and landed on a stick. Penry's shirt did not have holes in it, but Penry told the officers that the shirt he had been wearing when he was injured was at his father's house.

The officers obtained Penry's consent to search his father's house for the shirt and drove Penry back to the house. Penry entered the house, located the shirt, and gave it and an undershirt to the officers. The shirt and undershirt were later determined

to be torn in the location corresponding to Penry's puncture wounds. Both shirts had a blood stain around the tear.

The officers asked Penry to accompany them to the Carpenter home. Penry agreed. At the Carpenter home, Penry remained in Nelson's patrol car. While waiting in the patrol car, and not in response to any question, Penry told Nelson three times that he did not commit the crime. After they had been at the Carpenter home for approximately forty-five minutes, Penry told Nelson "that he wanted to get it off of his conscience." (S.F. Vol 43, p. 303). Nelson, believing Penry was to going to reiterate his innocence, told Penry to "be quiet." (*Id.*). Penry then said that he had "done it." (*Id.*, p. 304).

The officers brought Penry into the Carpenter home. Penry "point[ed] out things" before they reached the house and told Nelson "about the door that he had entered." (*Id.*, p. 305). Inside the house, Penry "explained everything in detail." (*Id.*, p. 306).

The officers drove Penry back to the Livingston police station. Penry was taken before Justice of the Peace Garnet Galloway, who read Penry his magistrate warnings, which are similar to *Miranda* warnings. Before Penry signed the warnings, Penry's father entered the courtroom and read Penry his *Miranda* rights. (1980 S.F.

Vol. 4, pp. 184, 204-07). Penry's father then asked Penry if he had committed the crime. Penry answered "yes."

Penry gave a written confession that afternoon and a second written confession the next day, both in narrative form. In the confessions, Penry stated that he had first met Carpenter three weeks earlier when he had helped "a guy named Harold" move some heavy appliances into Carpenter's home. Penry stated that he returned to Carpenter's home on October 25th, entered the house, and threatened Carpenter with his pocketknife. Carpenter fought with Penry, knocking the pocketknife out of Penry's hand and stabbing Penry in the back with a pair of scissors. Penry described subduing Carpenter, kicking and "stomping her," raping her, and stabbing her with the scissors. (1990 Jury Trial; State's Exhibit No. 48-A, p. 3). Penry then returned to his father's house.

At the trial, the State presented testimony from Harold Stubblefield. On October 9, 1979, Stubblefield had hired Penry to help install a freezer and stove in Carpenter's home. Stubblefield testified that Carpenter was present when he and Penry installed the appliances. The State also presented testimony from a forensic pathologist that the puncture wounds in Penry's back were consistent with wounds that could have been caused by the scissors found in Carpenter's home. The forensic pathologist also

testified that a large bruise on Carpenter's chest was consistent with an injury that could have been caused by a pair of boots obtained from Penry.

In his defense, Penry presented medical records documenting his mental retardation,[4] possible organic brain damage, and evidence he described as showing his desire to please authority figures. Penry also presented testimony from one of the officers that picked up Penry at his father's house on October 25, 1979. That officer testified that Penry put on shoes, rather than boots, when they left to go to the police station. Penry concluded with the testimony of Dr. Roberto Bayardo, a forensic

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[4] In *Penry* I, the Supreme Court described the mitigating evidence of mental retardation that Penry had presented to the jury during the sentencing phase of his first trial. The Court noted the evidence of mental retardation:

- As a child, Penry was diagnosed as having organic brain damage.
- Penry scored between 50 and 63 on IQ tests taken at different times, indicating "mild" or "moderate" mental retardation.
- Penry was evaluated as having the "mental age" of a 6-1/2 year old.
- Penry's "social maturity" was that of a 9 or 10 year old.
- Penry's mother, Shirley Penry, testified that Penry "was unable to learn in school and never finished the first grade."
- Penry was "in and out of a number of state schools and hospitals" until he was twelve years old, when he stopped attending school.
- Penry's aunt "struggled for over a year to teach Penry how to print his name."

Penry I, 109 S. Ct. at 2941-42.

pathologist. Dr. Bayardo testified that Penry's boots were unlikely to have caused the bruise on Carpenter's chest.

The State offered Dr. Fred Fason as a rebuttal witness. Dr. Fason testified that Penry had an antisocial personality, a factor that could lower the scores Penry obtained on IQ tests. Dr. Fason testified that such a personality would cause Penry to rebel against, rather than submit to, authority. Dr. Fason testified that he believed Penry did not have significant brain damage or mental retardation; Penry possessed the intellectual capacity to understand *Miranda* warnings and to waive those warnings in a knowing and intelligent manner; and Penry had the capacity to act intentionally.

During the sentencing phase of the retrial, the prosecution offered testimony from five prison guards and a deputy sheriff that Penry demonstrated aggressive and dangerous behavior in prison and while in custody during his first trial in 1980. The prosecution also offered testimony from Maurice Cook, the Texas Ranger who took Penry's second confession; from a woman mentioned in Penry's second confession as someone he had wanted to rape; and from a woman Penry was convicted of raping in 1977.

Penry presented Dr. Randall Price, a clinical neuropsychologist, who testified that he believed Penry suffered from organic brain impairment and mental retardation. Dr. Price testified that organic brain impairment can reduce the ability to

control behavior and impulses. One of Penry's childhood teachers testified that Penry was retarded and did not fake his retardation. Penry also presented additional medical records regarding his brain damage, mental retardation, and behavioral problems throughout his childhood and adolescence.

Several of Penry's relatives and childhood neighbors testified to Penry's childhood abuse. This evidence included testimony by Penry's sisters, Belinda Anderson and Trudy Ross; Penry's aunts, Lucille Anderson, Marilyn Barnet, and Patsy Ross; and Penry's neighbors, Carolyn Ward and Billie Johnson. The jury heard the following testimony:

- When Penry was ten months old, Penry's mother, Shirley Penry, "sock[ed]" Penry "right in the mouth" when he was sitting in his highchair. (1990 S.F. Vol. 48, p. 1165).

- When Penry was older, Shirley Penry beat her son almost every day, using belt buckles, belts, brooms, toy brooms, sticks, mop sticks, switches, and her fists. Shirley Penry would "stomp on" Penry, try to "claw[]" Penry, threaten to "scratch his little eyeballs out," hit Penry in the head with a shoe, put cigarettes out on Penry's skin, hold Penry's head under water, and make Penry stand in front of a heater until his legs blistered. (*Id.*, pp. 1086, 1088, 1113-15, 1264). When Penry was four years old, Shirley Penry placed him in boiling water that caused scarring from his waist down. (*Id.*, pp. 1125, 1261-62). Shirley Penry "[stood] there" as Penry screamed. (*Id.*, p. 1125).

- Shirley Penry would lock Penry in his room for up to twelve to fourteen hours without food or water, and sometimes for days at a time. (*Id.*, pp. 1083, 1116). When Penry was forced to defecate

in his room or the attic, Shirley Penry would beat him. (*Id.*, pp. 1262-63, 1271). On occasion, Shirley Penry forced Penry to drink his own urine and to eat his own feces. (*Id.*, pp. 1089-91, 1115-16).

- Neighbors heard "terrified screams, pleading screams" coming from the Penry household. (*Id.*, p. 1249).

- Shirley Penry verbally abused Penry, making comments such as "I ought to just drowned you, you little bastard" and calling him "short little bastard" and "mother-fucker." On one occasion, Shirley Penry grabbed a knife and threatened to cut off Penry's penis. (*Id.*, pp. 1085-86, 1088, 1118).

The prosecution offered Dr. Walter Quijano and Dr. Stanton Samenow as rebuttal witnesses. Dr. Quijano testified that he did not believe that Penry was mentally retarded, had brain damage, or lacked the capacity to control his impulses. Dr. Quijano and Dr. Samenow both testified that Penry had an antisocial personality and would be a danger in the future. Dr. Samenow testified that Penry could control himself and could act deliberately.

Based on this evidence and the court's instructions, the jury found Penry guilty of capital murder and sentenced him to death. In this habeas petition, Penry challenges some of the evidence presented, some of the evidence excluded, and the court's instructions.

III. The Applicable Legal Standards

A. The Antiterrorism and Effective Death Penalty Act

Penry filed this habeas petition on March 2, 1998; the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs. *Lindh v. Murphy*, 117 S. Ct. 2059, 2063 (1997); *Nobles v. Johnson*, 127 F.3d 409, 415 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1845 (1998); *Williams v. Cain*, 125 F.3d 269, 274 (5th Cir. 1997). The AEDPA provides that a federal habeas petition shall not be granted with respect to any claim adjudicated on the merits in state court[5] unless the adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254 (d)(1)-(2). The AEDPA further provides:

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a

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[5] In *Nobles*, the court noted that before applying the AEDPA standards, the court must determine whether the petitioner's claim was adjudicated on the merits in state court proceedings. *Nobles*, 127 F.3d at 416. Penry does not contend that his claims were not adjudicated on the merits in state court. In *Drinkard v. Johnson*, 97 F.3d 751, 768 (5th Cir. 1996), *overruled on other grounds by Lindh*, 117 S. Ct. at 2059, the Fifth Circuit held that a claim is adjudicated on the merits if, as here, the state court in post-conviction proceedings has entered findings of fact and/or conclusions of law on the issue.

> factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1).

Section 2254(d) establishes different standards of review for questions of fact, questions of law, and mixed questions of law and fact. Federal courts reviewing factual determinations may grant relief only if the state court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence." *Drinkard v. Johnson*, 97 F.3d 751, 767 (5th Cir. 1996) (quoting 28 U.S.C. § 2254(d)(2)), *cert. denied*, 117 S. Ct. 1114 (1997), *overruled on other grounds by Lindh*, 117 S. Ct. at 2059. In reviewing a question of law, a federal court may grant habeas relief only if it determines that a state court's decision was "contrary to . . . clearly established Federal law, as determined by the Supreme Court." *Id.* at 768 (quoting 28 U.S.C. § 2254(d)(1)). In reviewing a mixed question of law and fact, "a federal court may grant habeas relief only if it determines that the state court decision rested on 'an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court' to the facts of the case." *Id.* at 767-68 (quoting 28 U.S.C. § 2254(d)(1)) (alteration in original); *see also Nobles*, 127 F.3d at 416.

The "unreasonable application" standard requires more than a simple disagreement with a state court decision. *Drinkard*, 97 F.3d at 768. An application of law to facts is "unreasonable 'only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect.'" *Jones v. Jones*, 163 F.3d 285, 303 (5th Cir. 1998) (citing *Cain*, 125 F.3d at 277). A state court decision will not be reversed if the decision is a reasonable, good faith application of Supreme Court precedent. *Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir. 1996), *vacated in part on other grounds*, 105 F.3d 209 (5th Cir. 1997). A review of mixed questions of law and fact is "most closely akin to the traditional 'clearly erroneous' standard." *Id.* at 1267.

B. Procedural Default and Procedural Bar

"A procedural default . . . occurs when a prisoner fails to exhaust available state remedies and 'the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.'" *Nobles*, 127 F.3d at 420 (quoting *Coleman v. Thompson*, 111 S. Ct. 2546, 2557 n.1 (1991)). To exhaust state remedies, a habeas petitioner "must have provided the state courts with a 'fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim.'" *Id.* (quoting *Anderson v. Harless*, 103 S. Ct. 276, 277 (1982)); *see also Shute v. Texas*, 117 F.3d 233, 237

(5th Cir. 1997) ("To exhaust available state remedies, a habeas petitioner 'must fairly apprise the highest court of his state of the federal rights which were allegedly violated.'" (quoting *Deters v. Collins*, 985 F.2d 789, 795 (5th Cir. 1993))).

Texas courts considering unexhausted claims on a successive habeas petition would find them procedurally barred. Article 11.071 § 5(a) of the Texas Code of Criminal Procedure prohibits a Texas court from considering a successive habeas petition on the merits unless the petition satisfies one of the exceptions set forth in § 5(a)(1), (2), or (3).[6] The Texas Court of Criminal Appeals has applied article 11.071

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[6] Article 11.071 § 5(a) provides:

> (a) If an initial application for a writ of habeas corpus is untimely or if a subsequent application is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent or untimely initial application unless the application contains sufficient specific facts establishing that:
>
> (1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable: (A) on the date the applicant filed the previous application; or (B) if the applicant did not file an initial application, on or before the last date for the timely filing of an initial application;
>
> (2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or
>
> (3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071 or 37.0711.

to bar the presentation of new issues in successive petitions when the claimant's original petition was filed before the statute's effective date of September 1995. *Ex parte Davis*, 947 S.W.2d 216, 221 (Tex. Crim. App. 1996) (en banc). The Fifth Circuit has held that article 11.071 is an adequate state procedural bar, finding that the rule is strictly and regularly enforced. *Muniz v. Johnson*, 132 F.3d 214, 221 (5th Cir. 1998). The Texas abuse of the writ doctrine is also an adequate state procedural bar for the purpose of federal habeas review. *Nobles*, 127 F.3d at 423; *see also Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995).

In addition to the exhaustion issue, claims for federal habeas relief are procedurally barred if they were defaulted in the state court proceedings. "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 111 S. Ct. at 2565; *see also Muniz*, 132 F.3d at 220.

"'In order to prove a fundamental miscarriage of justice, the prisoner must assert his actual innocence.'" *Muniz*, 132 F.3d at 221 n.12 (quoting *Glover v. Cain*, 128 F.3d 900, 904 (5th Cir. 1997)); *see also Corwin v. Johnson*, 150 F.3d 467, 473 (5th Cir. 1998). In *Sawyer v. Whitley*, the Supreme Court held that a petitioner attempting to assert a procedurally defaulted challenge to his death sentence may overcome the default by showing that he is "'actually innocent' of the death penalty." 112 S. Ct. 2514, 2517 (1992). The petitioner must "show by clear and convincing evidence that but for constitutional error at his sentencing hearing, no reasonable juror would have found him eligible for the death penalty." *Id.* at 2525.

The *Sawyer* actual innocence exception is limited to factual innocence. *See Callins v. Johnson*, 89 F.3d 210, 215 (5th Cir. 1996); *Fearance*, 56 F.3d at 637-38. In *Callins*, the Fifth Circuit held that even if a mentally retarded person was constitutionally ineligible for the death penalty, that individual is not "actually innocent" under *Sawyer*. 89 F.3d at 215. Penry's argument that he may assert procedurally defaulted claims because he is mentally retarded and, therefore, "actually innocent" of the death penalty, is barred by Fifth Circuit precedent.

Each of Penry's claims is examined under the AEDPA.

IV. The Jury Instructions on Mitigating Evidence (Claim I)

At the close of the sentencing phase of Penry's 1980 trial, the jury imposed the death penalty by unanimously answering "yes" to the three "special issues" set out in the Texas Code of Criminal Procedure at article 37.071(b). The Supreme Court in *Penry* I determined that none of the three "special issues" clearly provided a means for the jury to give effect to Penry's mitigating evidence. *Penry*, 109 S. Ct. at 2949. The Supreme Court stated:

> [I]n the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision.

Id. at 2952.

At the conclusion of the sentencing phase of the 1990 trial, the court again submitted the same Texas statutory special issues that the jury had answered in *Penry* I:

> Special Issue No. 1
>
> Was the conduct of the defendant, JOHNNY PAUL PENRY, that caused the death of the deceased, PAMELA CARPENTER, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

Special Issue No. 2

Is there a probability that the defendant, JOHNNY PAUL PENRY, would commit criminal acts of violence that would constitute a continuing threat to society?

Special Issue No. 3

Was the conduct of the defendant, JOHNNY PAUL PENRY, in killing PAMELA CARPENTER, the deceased, unreasonable in response to the provocation, if any, by the deceased?

(Trans. Vol. 5, pp. 1330-31).

Unlike *Penry* I, however, the trial court on retrial also gave the following instructions:

You are instructed that if you return an affirmative finding on each of the special issues submitted to you, the court shall sentence the defendant to death. You are further instructed that if you return a negative finding on any special issue submitted to you, the court shall sentence the defendant to the Texas Department of Corrections for life. You are therefore instructed that your answers to the special issues, which determine the punishment to be assessed the defendant by the court, should be reflective of your finding as to the personal culpability of the defendant, JOHNNY PAUL PENRY, in this case.

You are instructed that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and

record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

(Trans. Vol. 5, p. 1329).

Penry argues that even with the added instructions, the special issues did not allow the jury to consider Penry's retardation and childhood abuse in deciding whether to answer "yes" or "no." Penry contends that if the jurors wished to give effect to the mitigating evidence, the trial court's instruction forced them to lie when answering the special issues and to violate their oaths to answer the special issues truthfully. Penry argues that the mitigating evidence instruction was merely a "nullification instruction" that did not cure the *Penry* I constitutional error.

The Texas Court of Criminal Appeals, on Penry's direct appeal, considered and rejected this claim, holding that the "nullification instruction . . . is sufficient to meet the constitutional requirements of *Penry v. Lynaugh*." *Penry*, 903 S.W.2d at 765. Whether a jury instruction placed relevant mitigating evidence beyond

the reach of the jurors is a mixed question of law and fact. *Drinkard*, 97 F.3d at 768-69. In this case, the state court's ruling is not an unreasonable application of clearly established federal law.

In *Buchanan v. Angelone*, 118 S. Ct. 757 (1998), the Supreme Court articulated the standard for determining whether jury instructions adequately permit a jury to consider and give effect to mitigating evidence: "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 761 (quoting *Boyde v. California*, 110 S. Ct. 1190, 1198 (1990)). A court addresses this issue by considering "the entire context in which the instructions were given." *Buchanan*, 118 S. Ct. at 762; *see also Johnson v. Texas*, 113 S. Ct. 2658, 2669 (1993). "In evaluating the instructions, we do not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would—with a 'commonsense understanding of the instructions in the light of all that has taken place at the trial.'" *Johnson v. Texas*, 113 S. Ct. at 2669 (quoting *Boyde*, 110 S. Ct. at 1198). "A *Penry* claim does not arise when constitutionally relevant evidence 'can be given mitigating effect *in some way* under the Texas special issues.'" *Davis v. Scott*, 51 F.3d 457, 464 (5th Cir. 1995) (quoting *Motley v. Collins*, 18 F.3d 1223, 1234 (5th Cir. 1994)) (emphasis in original).

Both the Supreme Court and the Fifth Circuit have held that jury arguments explaining how mitigating evidence can or should be considered in sentencing affect whether the jury was reasonably likely to have applied the instructions to prevent consideration of relevant mitigating evidence. *See Buchanan*, 118 S. Ct. at 762-63; *Drinkard*, 97 F.3d at 761 n.16. The Supreme Court has also noted that a defendant's presentation of extensive mitigating evidence is likely to convey to the jury that they may take the evidence into account in sentencing. *See Johnson v. Texas*, 113 S. Ct. at 368; *Boyde*, 110 S. Ct. at 1199-1200.

The record of Penry's 1990 trial supports the state appellate court's conclusion that the jury was able to give constitutionally sufficient consideration to Penry's mitigating evidence. During the voir dire examination of the venire in the 1990 trial, the prosecutor told the venire that they could answer one of the special issues "no" if they felt that Penry's mitigating evidence warranted a life sentence:

> Another area, in fact, that a jury can take into consideration is what we refer to loosely sometimes as mitigating evidence. There is not a separate question on mitigating evidence, but you will probably receive some sort of an instruction from the Judge, concerning mitigating evidence. . . . [F]urthermore, if you feel like that [mitigating] evidence is strong enough that you feel like it would even warrant a lesser sentence than death, that it would warrant a life

> sentence instead of death, then you can answer one or more of these questions no, so that the defendant will receive a life sentence instead of the death penalty.

(S.F. Vol. 15, pp. 186-87).

During closing argument in the sentencing phase, defense counsel emphasized this point:

> You are going to get just three yes or no questions. You are not going to get any questions about mitigating circumstances. Three questions called Special Issues, and none of them say anything about mentally retarded, none of them say anything about child abuse, but, the Judge told you, he told you that when you answer those questions you are to give affect [sic] and consideration to mitigating circumstances. If you determine, when giving affect [sic] to the mitigating evidence, if any, that a life sentence is reflected by a negative finding of the issue under consideration, rather than the death sentence, appropriate response to the personal culpability of the Defendant, then, a negative finding should be given to one of the Special Issues.

(S.F. Vol. 51, pp. 1902-03). Defense counsel then explicitly told the jury that they were able to answer "no" to one of the special issues despite the fact that a "no" answer was not the "literally correct" answer:

> Let me try to simplify it. If, when you thought about mental retardation and the child abuse, you think that this guy deserves a life sentence, and not a death sentence, decide life in prison is punishment enough, then, you got to answer one of those questions no. The Judge has not told you which question, and you have to give that answer, even if

> you decide the literally correct answer is yes. Not the easiest instruction to follow, and the law does funny things sometimes, but, it is what it says, and I have taken all of this time with you to make sure that you understand what it says. If you think that because of this mitigating evidence the man deserves a life sentence, then, there has got to be a no on that verdict sheet somewhere.

(*Id.*, p. 1903).

The court's instruction on the effect of mitigating evidence tracked *Penry* I by "informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty." The instruction went further, informing the jurors that they should answer one of the special questions "no" if they believed that Penry's personal culpability warranted a life sentence instead of death. Both the prosecutor and defense counsel told the jurors that they were able to answer one of the special issues "no" if they believed Penry's mitigating evidence warranted a life sentence, even if that answer was not "literally correct."

The Fifth Circuit recently approved a mitigating evidence instruction very similar to the instruction given to Penry's jury. In *Emery v. Johnson*, 139 F.3d 191 (5th Cir. 1997), the petitioner was sentenced to death under the version of the Texas Code of Criminal Procedure article 37.071 used in Penry's trial and retrial. The trial court in *Emery* gave an instruction which was virtually identical to that given by the trial court

at Penry's retrial. The Fifth Circuit upheld the instruction against the petitioner's *Penry* challenge, stating:

> This instruction allowed the jury to consider any appropriate mitigating circumstance, including a history of child abuse, and required the jury not to sentence Emery to death if a life sentence was appropriate in light of his moral culpability. The instruction adequately addressed the Court's concerns about Texas's death penalty scheme by giving the jury the ability to consider any appropriate mitigating circumstance.

Id. at 200. The Fifth Circuit's ruling in *Emery* supports the state court's conclusion as to Penry's first claim.

The state appellate court's conclusion that the trial court's instructions on mitigating evidence were constitutional is consistent with, and not an unreasonable application of, clearly established federal law. This court DENIES Penry's claim that the trial court's instructions did not permit the jury to consider and give effect to his mitigating evidence of mental retardation and childhood abuse.

V. The Eighth Amendment and an Emerging National Consensus (Claims II and III)

In *Penry* I, Penry argued that the execution of a mentally retarded person "like himself with a reasoning capacity of approximately a 7-year-old would be cruel and unusual [punishment] because it is disproportionate to his degree of personal culpability." *Penry* I, 109 S. Ct. at 2956. The Supreme Court rejected this argument,

holding that sentencing juries are able to evaluate sufficiently whether the extent of a particular defendant's mental retardation reduces his culpability to justify declining to impose a death sentence.

In *Penry* I, Penry also argued that "there is objective evidence . . . of an emerging national consensus against execution of the mentally retarded, reflecting the 'evolving standards of decency that mark the progress of a maturing society.'" *Id.* at 2955 (quoting *Trop v. Dulles*, 78 S. Ct. 590, 598 (1958)). The Supreme Court rejected this argument, finding insufficient evidence of a national consensus against execution of the mentally retarded to make it unconstitutional. *Id.* The Court held that the execution of a mentally retarded person would not violate the Eighth Amendment as long as the sentencing jury could consider and give effect to the nature and extent of the defendant's mental retardation in each case. *Id.* at 2958.

In his present petition, Penry again argues that the execution of a mentally retarded person violates the Eighth Amendment. Penry argues that since *Penry* I, a national consensus against execution of the mentally retarded has developed. Penry argues that this emerging national consensus against execution of the mentally retarded also "establishes a societal consensus against . . . the execution of persons exhibiting a certain level of mental retardation." Penry relies on new evidence, not presented in *Penry* I, to argue that current community views prohibit the execution of all mentally

retarded persons. Penry also relies on this new evidence to argue that the execution of an individual with his level of mental retardation is constitutionally prohibited.

This court considers both of Penry's arguments below.

A. The "Categorical" Challenge to the Death Sentence (Claim III)

Respondent argues that Penry's claim that the Eighth Amendment categorically prohibits execution of mentally retarded individuals is procedurally barred because, although Penry argued in state court that his execution would be unconstitutional because of *his* level of intelligence and background, he did not argue that execution of *any* mentally retarded person was categorically prohibited. Penry's direct appeal to the Court of Criminal Appeals did not contain an argument that "evolving standards of decency" categorically prohibit execution of any mentally retarded person. In his direct appeal, Penry did not cite or rely upon evidence of an evolving national standard forbidding execution of any mentally retarded individual. In contrast, Penry explicitly relies upon such evidence to support both of his arguments before this court. Penry also failed to raise this claim in his state habeas application. (Petition for a Post-Conviction Writ of Habeas Corpus, *Ex parte Penry*, Cause No. 15,977-C).

Penry did not give the Texas Court of Criminal Appeals a "'fair opportunity' to apply controlling legal principles to the facts bearing upon his . . .

claim" that the Eighth Amendment categorically bars execution of the mentally retarded. The claim is procedurally barred.[7]

Even if the claim was not procedurally barred, this court would reject the claim on its merits. Penry argues that there is sufficient objective evidence of a national consensus against execution of mentally retarded persons to enable a court to find that permitting the State of Texas to execute Penry would violate the "evolving standards of decency" that the Eighth Amendment protects. Penry has a "heavy burden" to show the national consensus he asserts. *Stanford v. Kentucky*, 109 S. Ct. 2969, 2977 (1989) (quoting *Gregg v. Georgia*, 96 S. Ct. 2909, 2926 (1976)).

In considering this argument in *Penry* I, the Supreme Court required an "objective indicator of contemporary values upon which we can rely," such as the "judgment of legislatures and juries." *Penry* I, 109 S. Ct. at 2955-56. The *Penry* I Supreme Court considered the following evidence:

- a federal criminal statute, the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(l) (1988), prohibiting the execution of a mentally retarded person;

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[7] This court does not find Penry's claim to be barred by the law of the case doctrine. Penry's evidence of national opposition to the execution of the mentally retarded arose after *Penry* I and demonstrates more extensive opposition to execution of the mentally retarded than was shown in *Penry* I. *See Society of the Roman Catholic Church of the Diocese of Lafayette, Inc. v. Interstate Fire & Cas. Co.*, 126 F.3d 727, 735 (5th Cir. 1997) (noting that the law of the case doctrine does not bar adjudication of a claim presented in a previous appeal if the "evidence in a subsequent trial was substantially different").

- one state, Georgia, banned the execution of a mentally retarded person;
- one state, Maryland, had enacted a statute banning the execution of a mentally retarded person to take effect on July 1, 1989;
- public opinion polls taken in Texas, Florida, and Georgia, showing public opposition to execution of the mentally retarded; and
- a resolution of the American Association on Mental Retardation opposing execution of the mentally retarded.

Id. at 2955.

The Supreme Court found that this evidence, combined with evidence that fourteen states did not allow the death penalty under any circumstances, was insufficient to show a national consensus against execution of the mentally retarded. *Id.* The Supreme Court found that public opinion polls expressing disapproval of the execution of mentally retarded persons and the opposition of the American Association on Mental Retardation were not sufficiently reliable indicators of a national consensus to allow the Court to find the execution of mentally retarded persons categorically prohibited by the Eighth Amendment. "The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely." *Id.*

Penry now offers evidence that the federal government and twelve of the thirty-eight states that allow capital punishment specifically exempt the mentally

retarded from the death penalty. *See* Violent Crime Control and Law Enforcement Act, 18 U.S.C. § 3596(c); Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(*l*); ARK. CODE ANN. § 5-4-618(b); COLO. REV. STAT. § 16-9-403; GA. CODE ANN. § 17-7-131(j); IND. CODE ANN. § 35-36-9-6; KAN. STAT. ANN. § 21-4623(d); KY. REV. STAT. ANN. § 532.140; MD. ANN. CODE of 1957, art. 27 § 412(g); NEB. REV. STAT. ANN. § 28-105.01(2); N.M. STAT. ANN. § 31-20A-2.1(B); N.Y. CRIM. PROC. LAW § 400.27(12); TENN. CODE ANN. § 39-13-203(b); WASH. REV. CODE ANN. § 10.95.030(2). Twelve additional states and the District of Columbia do not allow capital punishment under any circumstances.[8]

The Supreme Court has found the application of the death penalty to a particular class of persons inconsistent with "evolving standards of decency" in cases in which only a small number of states permitted the challenged application of the death penalty. *See Ford v. Wainwright*, 106 S. Ct. 2595, 2601 (1986) (no states permitted

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[8] Penry also cites two states in which bills prohibiting execution of mentally retarded persons are pending in the state legislature. *See* H.B. 2544, 43rd Leg. (Ariz. 1998) and H.B. 1288, 89th Leg., 2d Reg. Sess. (Mo. 1998). Both bills were introduced on January 13, 1998. Though neither bill was enacted into statute, both states have similar bills pending in their 1999 legislative sessions. *See* H.B. 2539, 44th Leg. (Ariz. 1999); H.B. 425, 90th Leg., 1st Reg. Sess. (Mo. 1999). Several other states, including Texas, are considering similar bills in their 1999 legislative sessions. *See, e.g.*, H.B. 2121, 76th Leg. (Tex. 1999); S.B. 180, 181st Leg. (Mass. 1999); H.F. 26, 78th Leg., 1st Sess. (Iowa 1999); S.B. 188, 74th Leg. (S.D. 1999).

Penry also cites two states that by statute allow capital punishment but have not executed any prisoners since the Supreme Court upheld the constitutionality of capital punishment in *Gregg v. Georgia*, 96 S. Ct. 2909, 2923 (1976), and do not have any prisoners currently on death row. Penry argues that these states have "implicitly rejected" capital punishment.

execution of the legally insane); *Enmund v. Florida*, 102 S. Ct. 3368, 3374 (1982) (only eight states permitted capital punishment for participation in a robbery in which an accomplice kills a person); *Coker v. Georgia*, 97 S. Ct. 2861, 2867-68 (1977) (only one state permitted capital punishment for the crime of rape of an adult woman); *see also Thompson v. Oklahoma*, 108 S. Ct. 2687, 2695-96 (1988) (no state that set minimum age limits on imposition of the death penalty permitted the execution of those who committed capital murder at age fifteen or younger).

In cases in which the Court has found that imposing the death penalty on a particular category of persons did not offend evolving standards of decency, over half the states that permitted capital punishment allowed execution of that category of persons. In *Stanford*, the Supreme Court considered whether imposing the death sentence on a sixteen or seventeen year-old defendant violated the Eighth Amendment. The Court noted that "[o]f the 37 States whose laws permit capital punishment, 15 decline to impose it upon 16-year-old offenders and 12 decline to impose it on 17-year-old offenders." *Stanford*, 109 S. Ct. at 2975. The Court concluded that "a majority of the States that permit capital punishment authorize it for crimes committed at age 16 or above." *Id.* at 2976. The Court relied on this empirical result in finding that the Constitution did not forbid such punishment. In *Tison v. Arizona*, 107 S. Ct. 1676, 1686 (1987), the Court upheld Arizona's imposition of the death penalty for a

defendant convicted of being a major participant in a felony with reckless indifference to human life, when eleven states that permitted capital punishment forbade the challenged imposition of the death penalty.

The record before this court shows that twenty-six of the thirty-eight states that permit capital punishment allow execution of the mentally retarded.[9] Under the Supreme Court precedents, this level of acceptance in the state legislatures does not provide the objective support for Penry's argument necessary before a court may find a violation of the Eighth Amendment on the ground of an emerging national consensus.

Penry also submits evidence from polls finding that jurors are less likely to sentence a defendant to death if the defendant is mentally retarded and evidence that relatively few mentally retarded persons have been executed since 1976. This evidence does not show that jurors or prosecutors are categorically opposed to the execution of all mentally retarded persons. Rather, the evidence supports the ability of jurors to give

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[9] The *Stanford* Court explicitly rejected the argument that the number of states permitting the challenged application of the death penalty should be compared to the number of states overall, including those that do not allow the death penalty at all. *Stanford*, 109 S. Ct. at 2975-76 n.2. The Court also rejected the argument that the fact that the federal government has made a class of individuals ineligible for the death penalty is determinative of a national consensus. *See id.* at 2977 ("[E]ven if it were true that no federal statute permitted the execution of persons under 18, that would not remotely establish—in the face of a substantial number of state statutes to the contrary—a national consensus that such punishment is inhumane, any more than the absence of a federal lottery establishes a national consensus that lotteries are socially harmful.").

effect to a particular defendant's mental retardation as a mitigating circumstance in sentencing. *See Stanford*, 109 S. Ct. at 2977.

In *Penry* I, the Supreme Court rejected Penry's evidence of public opinion polls and statements from professional associations expressing opposition to execution of mentally retarded persons as insufficient to show a national consensus against the application of the death penalty to a particular class of persons. *Penry* I, 109 S. Ct. 2955. The evidence in *Penry* II portrays a growing disapproval of the execution of the mentally retarded. However, the Supreme Court has not held that evidence of a trend against a particular application of the death penalty is sufficient to enable a court to find that application "cruel and unusual." *See Stanford*, 109 S. Ct. at 2975-76 (requiring the petitioner to establish a "*degree* of national consensus . . . sufficient to label a particular punishment cruel and unusual" (emphasis added)); *id.* at 2977 (stating that the petitioner has a "'heavy burden' . . . to establish a national consensus" against an application of the death penalty); *id.* (noting that the petitioner had not established a "settled consensus"); *Penry* I, 109 S. Ct. at 2955 (noting that although Penry's public opinion and professional association evidence may "ultimately find expression in legislation," the evidence had failed to establish a present "national consensus").

Penry's arguments and data do not respond to a fundamental problem the Supreme Court identified with the "categorically ineligible" approach Penry advances.

In *Penry* I, the Supreme Court noted that a categorical prohibition against imposing a punishment against all retarded persons but permitting the same punishment for others had a troubling and dangerous consequence. The Court noted that "[m]entally retarded persons are individuals whose abilities and experiences can vary greatly," *Penry* I, 109 S. Ct. at 2957, as can their ability to bear personal culpability for their actions. The Court recognized the difficulty, and danger, in reducing all mentally retarded individuals to a single category. Such a categorical approach could improperly limit hard-won opportunities for retarded persons to participate fully in events requiring legal recognition, such as marriage or making contracts. *Id.* at 2958. Penry does not address the difficulty inherent in his argument.

Penry's evidence is not sufficient to permit this court to find that there currently exists a "national consensus" against execution of mentally retarded persons, making such executions unconstitutional. Penry is not entitled to federal habeas relief on this claim, both because it is procedurally barred and on the merits. This court DENIES Penry's claim that the execution of any mentally retarded person violates the Eighth Amendment's prohibition of "cruel and unusual" punishment.

B. The Particularized Challenge to the Death Sentence (Claim II)

In his federal petition for habeas relief, Penry reiterates the argument he made on direct appeal in state court, that the degree and nature of his mental retardation

and history of childhood abuse make him insufficiently culpable to permit his execution. Respondent asserts that the claim is barred by 28 U.S.C. § 2244(b)(1) as a successive petition because the Supreme Court considered and rejected it in *Penry* I.

Section 2244(b)(1) states: "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." The AEDPA does not alter the pre-AEDPA definition of a ""second or successive' petition." *In re Gasery*, 116 F.3d 1051, 1052 (5th Cir. 1997). Circuits that have considered the issue have held that a claim in a habeas petition filed after a retrial and second conviction is not treated as presented in a "second" or "successive" petition if it attacks only the second conviction or sentence. *See, e.g.*, *Esposito v. United States*, 135 F.3d 111, 113 (2d Cir. 1997); *Pratt v. United States*, 129 F.3d 54, 62 (1st Cir. 1997); *Palmer v. Clarke*, 961 F.2d 771, 774-75 (8th Cir. 1992). Penry's claim that the evidence of the nature and extent of his mental impairment presented in the 1990 retrial makes the death sentence he received unconstitutional is not barred by section 2244(b)(1).

Respondent alternatively argues that this court is barred from considering Penry's argument by the "law of the case" doctrine. The doctrine of the law of the case is inapplicable because additional evidence, not presented in his first trial, provides changed factual support for Penry's claim. *Society of the Roman Catholic Church of*

the Diocese of Lafayette, Inc. v. Interstate Fire & Cas. Co., 126 F.3d 727, 735 (5th Cir. 1997). Penry's claim is not barred by the law of the case doctrine.

On Penry's direct appeal, the Texas Court of Criminal Appeals noted that the "Eighth Amendment does not preclude the execution of mentally retarded persons," citing *Penry* I. *Penry*, 903 S.W.2d at 766. The Texas appellate court stated further that there is no "authority stating that it is unconstitutional to execute persons who have brain damage or were abused as children." *Id.* at 766-67. Again citing *Penry* I, the Texas court concluded that the Eighth Amendment was satisfied because Penry's sentencing jury had the "means to consider all of the evidence, including [Penry's] mitigating circumstances, and yet determined that death was the appropriate punishment." *Id.* at 767. The state court's decision on this mixed question of law and fact is not an unreasonable application of federal law as clearly established by the United States Supreme Court.

In his second trial, Penry presented Dr. Randall Price as a witness. Dr. Price drew an explicit link between what he believed to be Penry's organic brain damage and Penry's inability to control himself or use good judgment. (S.F. Vol. 48, pp. 1337-38). Penry also presented far more graphic and extensive evidence of the abuse he suffered as a child than had been presented in his first trial. Penry's new evidence of childhood abuse included evidence that he had suffered more frequent and

more violent physical, mental, and psychological abuse than had been apparent from the evidence introduced in his first trial.

In *Penry* I, the Supreme Court held that the constitutional requirements are met when a jury is able to consider and give effect to mitigating evidence that may show that a particular defendant cannot be held culpable for his actions. *Penry* I, 109 S. Ct. at 2958. In Penry's second trial, the jury heard extensive mitigating evidence, argument, and instructions. The jury was able to consider whether Penry's mental retardation and his childhood abuse lessened Penry's culpability to a level at which the death penalty was not an "appropriate punishment."

This court finds that, considering the additional mitigating evidence Penry presented in his second trial, the Texas Court of Criminal Appeals' conclusion that the execution of someone with Penry's level of mental retardation and history of childhood abuse does not violate the Eighth Amendment was not an unreasonable application of federal law. This court DENIES Penry's request for habeas relief based on Claim II.

C. The Combination of Claims II and III

Penry characterizes Claim II as dependent on his new evidence of a national trend toward disapproval of execution of the mentally retarded. "[I]t may be possible that this objective evidence establishes a societal consensus against only the execution of persons exhibiting a certain level of mental retardation." (Docket Entry

No. 28, p. 21). This argument is not barred by the law of the case doctrine because it is narrower than the categorical Eighth Amendment argument the Supreme Court considered in *Penry* I and because it relies on "substantially different" evidence. Because it attacks a second conviction, Penry's habeas petition is not governed by rules restricting the consideration of successive petitions. Penry's claim is not barred by 28 U.S.C. § 2244(b)(2), which forecloses consideration of a claim presented in a successive petition that was not presented in a prior petition, because the claim relies on evidence of an alleged national consensus developed since Penry's first habeas petition.

Penry did not, however, present this claim to the Texas courts on appeal or during the state habeas proceedings. Indeed, Penry did not articulate this argument until his reply. Respondent did not have an opportunity to raise a procedural default bar to the argument. This court is not required to raise a procedural default *sua sponte*. *See Trest v. Cain*, 118 S. Ct. 478, 480 (1997) ("We are not aware of any precedent stating that a habeas court must raise [a procedural default] where the State itself does not do so."). While a district court may exercise its discretion to raise a procedural default *sua sponte*, *Magouirk v. Phillips*, 144 F.3d 348, 357 (5th Cir. 1998), this court concludes that it should not avoid the merits of Penry's "combination" claim by raising a procedural default bar.

This court finds that Penry's new evidence of the degree of his mental retardation and the effects of the childhood abuse he suffered, in combination with the previously available evidence, is not sufficient to raise a fact issue that a national consensus has developed, making it unconstitutional to execute such an individual. Penry's summary judgment evidence does not provide the objective support necessary to create a fact issue that a national consensus against the execution of a person with Penry's level and degree of mental capability has developed, requiring a finding of a constitutional violation. Summary judgment in favor of respondent on this claim is appropriate. *See, e.g.*, *Goodwin v. Johnson*, 132 F.3d 162, 169 (5th Cir. 1997) (applying the Rule 56 summary judgment standard to a capital defendant's habeas petition).

This court DENIES Penry's claim that his execution violates the Eighth Amendment because there exists a national consensus against applying the death penalty to an individual with Penry's level of mental retardation and background of abuse.

VI. The *Simmons* Claim (Claim IV)

In *Simmons v. South Carolina*, 114 S. Ct. 2187, 2190 (1994), the Supreme Court held that when a capital murder defendant would be ineligible for parole under state law if sentenced to life imprisonment, and the prosecution argues that the

defendant would be dangerous in the future, due process requires the jury to be informed that the defendant would be ineligible for parole. The Fifth Circuit has rejected the extension of the *Simmons* rule to a Texas capital defendant. Under Texas law, a capital defendant is not legally ineligible for parole. In *Allridge v. Scott*, the Fifth Circuit held that *Simmons* applies only to situations in which the defendant is "legally ineligible" for parole.[10] 41 F.3d 213, 222 (5th Cir. 1994); *see also Boyd v. Johnson*, No. 97-10823, 1999 WL 71660, at *5 (5th Cir. Feb. 12, 1999) (to be published in F. 3d.); *Muniz v. Johnson*, 132 F.3d 214, 224 (5th Cir. 1998); *Woods v. Johnson*, 75 F.3d 1017, 1037 (5th Cir. 1996); *Montoya v. Scott*, 65 F.3d 405, 416 (5th Cir. 1995).

It is undisputed that Penry would have been legally eligible for parole had he been sentenced to life imprisonment. However, during the sentencing phase of the retrial, Penry offered into evidence his signed statement purporting "to give up [his]

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[10] Penry argues that this court should not follow the *Allridge* line of cases in light of an opinion joined by four Justices of the Supreme Court dissenting from the denial of a petition for writ of *certiorari* in *Brown v. Texas*, 118 S. Ct. 355 (1997) (Stevens, J., dissenting from the denial of petition for a writ of *certiorari*). In his opinion, Justice Stevens noted that there was an "obvious tension" between *Simmons* and the refusal by the State of Texas to allow a defendant to give the jury truthful information about his parole eligibility. *Id.* at 355. An opinion dissenting from the denial of a petition for writ of *certiorari* does not have precedential value. The Fifth Circuit cases on point, based on Supreme Court majority opinions, are binding on this court. *See Teague v. Lane*, 109 S. Ct. 1060, 1067-68 (1989). The Fifth Circuit has recognized, but specifically declined to apply, Justice Stevens' dissenting opinion in an opinion addressing a *Simmons* claim. *See Muniz*, 132 F.3d at 224 n.22 (citing Justice Stevens' dissenting opinion as "*but cf.*").

right to parole for the rest of [his] life." The trial court sustained the prosecutor's objection to the introduction of this statement and excluded Penry's statement from evidence. (S.F. Vol. 50, pp. 1600-02).

During the sentencing phase of the trial, the court instructed the jury not to consider the possibility of parole in determining Penry's sentence. (Trans. Vol. 5, p. 1328; S.F. Vol. 51, pp. 1915-16). In his closing argument, the prosecutor argued that Penry would be a future danger to society. (S.F. Vol. 51, pp. 1946-47). After closing arguments, immediately after the jury began to deliberate, Penry's counsel objected to the prosecutor's future dangerousness argument and moved for a mistrial. (*Id.*, pp. 1948-49). The trial court overruled Penry's objection and denied his motion. (*Id.*, p. 1949).

Penry argues that the trial court erred by permitting the prosecutor to argue that Penry would be a future danger to society while denying Penry the opportunity to present evidence that parole was at least highly unlikely. Penry appears also to challenge the trial court's refusal to give Penry's requested jury instruction regarding parole.

On direct appeal, the Texas Court of Criminal Appeals rejected Penry's challenge to the jury instruction, noting that Penry's offer of "waiver of parole" was not

legally binding. *Penry*, 903 S.W.2d at 763-64. The court rejected Penry's challenge to the prosecutor's argument as not properly preserved for review. *Id.* at 764.

A. The Prosecution's Argument

Penry procedurally defaulted on his claim that the prosecution's closing argument violated his rights. A procedural default in state court bars federal habeas review if the last state court rendering a judgment clearly and expressly rests its judgment on the procedural default. *Muniz*, 132 F.3d at 220; *Moore v. Roberts*, 83 F.3d 699, 702 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 772 (1997). The Fifth Circuit has held that the Texas contemporaneous objection rule is an independent and adequate state procedural bar. *Muniz*, 132 F.3d at 221; *Livingston v. Johnson*, 107 F.3d 297, 311-12 (5th Cir. 1997); *Amos v. Scott*, 61 F.3d 333, 345 (5th Cir. 1995). Penry does not argue that he meets the cause and prejudice or actual innocence exceptions to the procedural default rule. To the extent that Penry's *Simmons* claim rests on the trial court's failure to grant his motion for a mistrial based on the prosecutor's future dangerousness argument, he has procedurally defaulted that claim.

B. The Trial Court's Instructions

Penry's *Simmons* claim can also be read as a challenge to the trial court's failure to instruct the jury on the remoteness of Penry's chances for parole, based on Penry's signed "waiver." The Court of Criminal Appeals rejected Penry's *Simmons*

claim on the merits, holding that under Texas law "[t]he matter of parole or a defendant's release thereon is not a proper consideration for a jury's deliberations in the punishment phase of a capital murder trial." *Penry*, 903 S.W.2d at 764. The Texas court's conclusion is consistent with the Fifth Circuit decision in *Allridge*, and is neither contrary to, nor an unreasonable application of, clearly established federal law.

Penry argues that his case is distinguishable from *Allridge* because he offered, in a written, signed statement, to become "parole ineligible." Penry offers the affidavit of Dr. James W. Marquart, a professor of criminology at Sam Houston State University, opining that the Texas parole board would have given "great weight" to Penry's signed "waiver" in deciding whether to grant Penry parole in the future. (Docket Entry No. 19, Appendix, Ex. C, Affidavit of James W. Marquart, ¶ 4). Dr. Marquart recognized that Penry's signed statement was not a legally binding waiver of parole, but stated that "a parole board would have seen that document and given it great weight in determining whether Mr. Penry should be paroled," even if Penry "changed his mind and sought to 'take back' this statement." (*Id.*, ¶¶ 4, 7). In Dr. Marquart's opinion, the combination of the nature of Penry's crime and Penry's signed statement would have "forever erased [Penry's] chances of parole." (*Id.*, ¶ 8). Penry argues that in sentencing, the jury was entitled to consider that for all practical purposes, Penry would not receive parole.

It is undisputed that Penry's statement of waiver did not make him "legally ineligible" for parole. Dr. Marquart's affidavit speculates as to what the parole board might decide in the future. The Fifth Circuit cases clearly hold that *Simmons* is restricted to situations in which the defendant is presently ineligible for parole, as a matter of law. *See Boyd*, 1999 WL 71660, at *5; *Muniz*, 132 F.3d at 224; *Woods*, 75 F.3d at 1037; *Johnson v. Scott*, 68 F.3d 106, 111 (5th Cir. 1995); *Montoya*, 65 F.3d at 416; *Kinnamon v. Scott*, 40 F.3d 731, 733 (5th Cir. 1994). As the court stated in *Allridge*:

> A capital defendant's parole ineligibility . . . must be a matter of law because evidence of such ineligibility is inherently "truthful" and allows the defendant to deny or explain the state's case for future dangerousness. But if a defendant's ineligibility is a matter of fact, i.e., the defendant *probably* will not be eligible for parole, then the evidence is purely speculative (maybe even inherently "untruthful") and therefore cannot positively deny future dangerousness. The jury is left only to speculate about what a parole board may, or may not, do twenty or thirty years hence.

Allridge, 41 F.3d at 221-22 (citations omitted) (emphasis in original).

Penry argues that his case is different from *Allridge* because the prosecutor based his future dangerousness argument on Penry's danger to "free" society, improperly referencing a possibility of parole. The case law does not support Penry's proffered distinction. Even when the prosecution argues that a defendant will

be a future danger to "free" society, *Simmons* does not apply unless the defendant is legally ineligible for parole. *Id.* at 222. Penry's case does not violate *Simmons* simply because the prosecutor argued that Penry may be a future danger to "free" society.

This court must follow binding Fifth Circuit precedent. That precedent establishes that the Texas Court of Criminal Appeals' rejection of Penry's *Simmons* claim was not "contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court." This court DENIES Penry's *Simmons* claim.[11]

VII. The *Estelle v. Smith* Claim (Claim V)

In *Estelle v. Smith*, 101 S. Ct. 1866 (1981), the Supreme Court held that the prosecution's use of a capital murder defendant's pretrial psychiatric examination in the sentencing phase as the basis for an examining psychiatrist's opinion as to the defendant's future dangerousness violated the Fifth and Sixth Amendments. The

[11] Penry requests an evidentiary hearing on his *Simmons* claim. Penry argues that he could offer evidence "regarding how often, if ever, a defendant tried for capital murder has been paroled -- at any point in his or her sentence." (Docket Entry No. 28, p. 39). Even if Penry presented such evidence, it would not distinguish his case from the *Allridge* line of cases. This court may not grant an evidentiary hearing on a claim which the petitioner has failed to develop in state court unless "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B). Penry's alleged constitutional error does not relate to his guilt. Moreover, even if Penry could prove the facts underlying the claim, he would not be entitled under *Allridge* to a reversal of his sentence. Penry's request for an evidentiary hearing to develop his *Simmons* claim is DENIED.

Supreme Court held that in the absence of proper *Miranda* warnings and an effective waiver from the defendant, the Fifth Amendment privilege against self-incrimination precluded the State from using statements the defendant made during the pretrial psychiatric examination to prove the defendant's future dangerousness. *Id.* at 1876.

In *Buchanan v. Kentucky*, 107 S. Ct. 2906 (1987), the Supreme Court clarified that its holding in *Estelle* did not apply if the defendant requested a pretrial psychiatric examination or if the defendant presented psychiatric evidence at trial. *Id.* at 2917-18. The Fifth Circuit has held that the first exception, that the defendant requests the examination, applies only if the defendant specifically requests an evaluation as to his future dangerousness. *See Vanderbilt v. Collins*, 994 F.2d 189, 196 (5th Cir. 1993); *Battie v. Estelle*, 655 F.2d 692, 702 (5th Cir. 1981).

In *Estelle v. Smith*, the Supreme Court also found that the State's failure to give defense counsel notice of the examination, including its scope and nature, violated the defendant's Sixth Amendment rights. *Estelle*, 101 S. Ct. at 1877. The State violates the Sixth Amendment if defense counsel is told that the defendant will be examined, but not that the examination will be used as evidence of the defendant's future dangerousness. *Vanderbilt*, 994 F.2d at 198. In *Powell v. Texas*, 109 S. Ct. 3146 (1989), the Court held that a defendant does not waive his Sixth Amendment right to counsel even if the defendant waives a Fifth Amendment challenge to the State's use

of statements he or she made in a pretrial psychiatric examination by requesting the examination or by introducing psychiatric evidence. *Id.* at 3150.

Penry argues that both his Fifth and Sixth Amendment rights were violated when the prosecution presented testimony from three psychiatrists and then used that testimony to argue that Penry would be dangerous in the future and that his mental status did not make the death sentence inappropriate.

A. The Psychiatric Testimony and the Prosecution's Argument

1. Dr. Fason's Testimony

During the guilt/innocence phase of Penry's second trial, Dr. Fason told the jury that he had conducted one three-minute interview with Penry and one twenty-minute interview. During both interviews, Penry communicated fully, identified his lawyer, and acted appropriately. (S.F. Vol. 46, pp. 786-88). Dr. Fason denied that he observed "any kind of a psychosis, or other type of mental illness" in Penry during the interviews. (*Id.*, p. 788). Dr. Fason discussed the accuracy of IQ tests and noted that a personality disorder, such as an antisocial personality, could affect a person's score on an IQ test. (*Id.*, pp. 788-92). Dr. Fason stated that he had reviewed "rather extensive" records "pertaining to Johnny Paul Penry's prior history" and records of neurological testing done on Penry. (*Id.*, pp. 794-95). Dr. Fason stated that he

disagreed with a report that concluded that Penry "may have a significant degree of brain damage." (*Id.*, p. 795).

The prosecutor then asked Dr. Fason for his opinion as to Penry's mental status in 1979, when the alleged rape and murder occurred. Dr. Fason concluded that "based on all of those records that [he] reviewed and [his] personal interviews with [Penry], the tests, [Dr. Fason's] training and experience and education," Penry "is on the borderline between mild mental retardation and dull normal." (*Id.*, p. 796). Dr. Fason also testified that Penry "has a personality disorder, an anti-social personality disorder." (*Id.*). Dr. Fason admitted that a person with an antisocial personality disorder could also be referred to as a "psycho-path." (*Id.*). Dr. Fason described an antisocial personality as "a person that has repeated difficulties with authority. They tend to be very selfish, callous and self-centered." (*Id.*, p. 798). Dr. Fason testified that he did not know of a cure for an antisocial personality. (*Id.*, p. 800). Dr. Fason then again explained that an antisocial personality disorder could lower a person's score on an IQ test.

The prosecutor asked Dr. Fason whether Penry "is the type of person that looks up to an authority figure." (*Id.*, p. 804). Dr. Fason testified that he believed Penry does not respect authority and would not be "led easily by other people" because of his antisocial personality. (*Id.*, pp. 804-05). Dr. Fason also testified that he

believed Penry had the capacity to act intentionally and possessed the intellectual capability to understand *Miranda* warnings and waive those warnings knowingly and intelligently. (*Id.*, pp. 811-13).

Although Dr. Fason did not specifically testify as to Penry's future dangerousness, the prosecutor referred to Dr. Fason's testimony during the sentencing phase of the trial in arguing Penry's future dangerousness. (S.F. Vol. 51, pp. 1933-34).

2. Dr. Quijano's Testimony

During the sentencing phase, Dr. Quijano testified that although Penry's IQ test scores placed him in the "mildly mentally retarded" to "borderline" range of intelligence, Penry's "adaptive skills" were sufficient to classify him as "not mentally retarded." (S.F. Vol 50, pp. 1629, 1648). Dr. Quijano also testified that he believed Penry had the ability to control his actions. After Dr. Quijano denied that Penry was retarded or had organic brain damage, Dr. Quijano testified that Penry suffered from an antisocial personality disorder. (*Id.*, pp. 1648-49). As evidence of Penry's antisocial personality, Dr. Quijano noted

> repeated violations of the law, disregard of the rights of others, the inability to learn from previous experience in the sense that one does not profit from the punishment or from being caught. There is an element of cold bloodiness [sic] without it, the person does not experience remorse . . . .

(*Id.*, p. 1651). Dr. Quijano also testified that persons with an antisocial personality and a history of violence could be classified as dangerous and that there is no cure for an antisocial personality. (*Id.*, p. 1652). Dr. Quijano testified that he believed Penry "is more likely to engage in continuing acts of violence in the future." (*Id.*, p. 1654).

3. Dr. Samenow's Testimony and Dr. Peebles' Report

Dr. Samenow testified during the sentencing phase that he believed Penry to have an "anti-social personality." (*Id.*, p. 1731). Dr. Samenow agreed that Penry was aggressive, violent, manipulative, dangerous, and unremorseful. (*Id.*, pp. 1734-36). When asked if he believed Penry was likely to change, Dr. Samenow testified that "the prognosis would be pretty bleak." (*Id.*, p. 1736).

In his testimony during the sentencing phase of Penry's 1990 trial, Dr. Samenow made only one reference to a report from Dr. Peebles, who had examined Penry before his 1977 conviction for aggravated rape. Penry's counsel had requested that Dr. Peebles examine Penry. (S.F. Vol. 47, p. 1058). Dr. Samenow noted that Dr. Peebles' report reflected that Penry "on occasion, heard voices and saw things, but . . . he probably learned this at Rusk State Hospital and is using this as an excuse to cover up his offenses." (S.F. Vol. 50, p. 1729). Dr. Samenow then testified that "TDC Medical Records" showed that Penry had on occasion used his mental retardation as an excuse for violent or destructive behavior. (*Id.*, pp. 1730-31). Dr. Samenow

testified that he had developed his diagnosis of Penry's antisocial personality from a review of "records" showing that Penry had a history of committing "anti-social acts" and a "broad range of criminal activity." (*Id.*, pp. 1731-32). Dr. Samenow testified that he based his conclusion that Penry's crimes were planned or premeditated from these same "records" and from Penry's "prior criminal and violent behavior." (*Id.*, pp. 1733-34). Dr. Samenow broadly referred to the "TDC Medical Records" as supporting his opinion that Penry could exercise self-control; could act deliberately; was aggressive, violent, and manipulative; was capable of acting voluntarily; and was dangerous and unlikely to change. (*Id.*, pp. 1734-37).[12]

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[12] Dr. Samenow's description of the records he reviewed in preparing to testify shows that Dr. Peebles' report was one of many documents that Dr. Samenow consulted. Dr. Samenow testified that he reviewed

> [t]he confession of the Defendant that was dated 1979, I believe, two of them. Information concerning 1977 rape conviction involving a Diana Koch. The Defendant's records from Austin State Hospital, University of Texas Medical Branch at Galveston, TDC Medical and Mental Health Records, Mental Health or records from the Polk County Mental Health and Mental Retardation Unit, records from the Mexia State School, records from the Texas Rehabilitation Commission, the Rusk State Hospital, the Goose Creek Independent School District, Competency and Insanity Examination by Dr. Kenneth A. Vogtsberger, TDC Disciplinary Records on this Defendant, both for his current incarceration and prior incarceration, I believe a Competency Trial Transcript . . . .

(S.F. Vol. 50, pp. 1715-16).

4. The Prosecutor's Use of Dr. Peebles' Report in Closing Argument

In closing argument, the prosecutor used Dr. Peebles' report to argue Penry's future dangerousness:

> In 1977, this man raped Diana Rearden. A few months later he was examined by Dr. Felix Pebbles [sic], who found that he was sane. He knew the difference between right and wrong, and he was competent to stand trial, but, Dr. Pebbles [sic], went on and made an additional finding that was really out of the ordinary, and I have never seen this in any kind of a report, he just added it, he said that it is my further professional opinion, that if Johnny Paul Penry were released from custody, that he would be dangerous to other persons.

(S.F. Vol. 51, pp. 1946-47).

B. The Findings and Conclusions of the State Court

On Penry's direct appeal, the Texas Court of Criminal Appeals thoroughly discussed Penry's *Estelle v. Smith* claim and, applying the Supreme Court rulings in *Estelle* and *Buchanan*, rejected the claim. *Penry*, 903 S.W.2d at 757-60. As to the Sixth Amendment claim, the Texas court found that Penry's attorney was "on notice that if he intended to put on a 'mental status' defense, he would have to anticipate the use of psychological evidence by the prosecution in rebuttal." *Id.* at 758-59. The court also found that Penry was not examined for future dangerousness. Based on these findings, the Texas court concluded that there had been no Sixth Amendment violation.

As to Penry's Fifth Amendment claim, the Texas Court of Criminal Appeals found that the testimony of Dr. Fason, who did not testify regarding future dangerousness, was proper rebuttal testimony under *Buchanan*. The state court noted that Dr. Quijano had testified as to Penry's future dangerousness but did not base his opinion on his examination of Penry. *Id.* at 759. As to Dr. Peebles' 1977 examination, the state court found that defense counsel had requested that examination and that during the 1990 trial, no expert witness referred to any testimonial statements contained in the Peebles report. *Id.* The state appellate court specifically found that Dr. Samenow and Dr. Quijano did not base their opinions regarding future dangerousness on Dr. Peebles' examination and report. *Id.* Based on these facts, the Texas court concluded that *Estelle* did not apply to Penry's trial and did not support his claim for relief. *Id.* The Texas court determined that Penry's claim regarding the prosecutor's closing argument was procedurally barred. *Id.* at 760.

This court finds that Penry has failed to rebut, by the necessary clear and convincing evidence, the presumption that the state court's factual findings are correct, as the AEDPA requires. The legal conclusions of the Texas Court of Criminal Appeals are neither contrary to, nor an unreasonable application of, clearly established federal law, and they are not based on an unreasonable determination of the facts in light of the

evidence presented. This court DENIES Penry's request for federal habeas relief on his *Estelle v. Smith* claim.

C. Harmless Error Analysis

Even if this court rejected the Texas Court of Criminal Appeals' findings and concluded that Dr. Fason's testimony violated *Estelle v. Smith* to the extent that it went beyond rebutting the testimony Penry offered by providing an opinion as to future dangerousness, the error was harmless under *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993).

Under *Brecht*, a trial error of constitutional magnitude does not entitle a defendant to habeas relief unless the error "'had a substantial or injurious effect or influence in determining the jury's verdict.'" *Id.* at 1722 (quoting *Kotteakos v. United States*, 66 S. Ct. 1239, 1253 (1946)); *see also Harris v. Warden, Louisiana State Penitentiary*, 152 F.3d 430, 437 (5th Cir. 1998); *Woods v. Johnson*, 75 F.3d at 1017, 1026-33 (5th Cir. 1996) (applying the *Brecht* standard to reject a petitioner's *Estelle* claim). In *Woods*, the Fifth Circuit found the prosecution's violation of *Estelle* to be harmless because the psychiatrist's testimony as to future dangerousness was "equivocating and weak"; the jury could not reasonably construe the psychiatrist's testimony as based on his examination of the defendant; and the prosecution primarily relied on other evidence of the defendant's future dangerousness. *Woods*, 75 F.3d at

1027, 1028-33. The *Woods* court found the psychiatrist's testimony to be "equivocating and weak" for two reasons. The psychiatrist admitted that behavioral scientists' efforts to predict future behavior were not very accurate. He also testified only that someone who had committed violent acts in the past was "more likely" to commit future violent acts. *Id.* at 1027.

Dr. Fason's direct testimony on Penry's future dangerousness was highly "equivocating and weak," so much so that it is debatable whether he even testified as to future dangerousness. Additionally, on cross-examination, Dr. Fason substantially limited the potential impact of his direct testimony. After Penry's counsel asked Dr. Fason if he would need longer than a twenty-minute examination to make a diagnosis of an antisocial personality, Dr. Fason answered that, although he would not need additional time to make a "diagnosis," he would need significantly more time to make a prognosis as to the future and, indeed, could not make such a prognosis as a scientific opinion. (S.F. Vol. 46, p. 821). This testimony is similar to the psychiatrist's testimony in *Woods*, disclaiming an ability to predict the defendant's future dangerousness beyond a statement that someone with a past history of violent acts has a greater likelihood of committing future violence than a person with no prior violent conduct.

Dr. Fason's testimony on direct examination was less inflammatory than testimony presented in cases finding harmful error. *See Satterwhite v. Texas*, 108 S. Ct. 1792, 1799 (1988) (the psychologist testified that the defendant unequivocally "will present a continuing threat to society by continuing acts of violence," was "as severe a sociopath as you can be," and was "beyond the reach of psychiatric rehabilitation"); *Estelle*, 101 S. Ct. at 1871 (the psychologist testified that the defendant was a "very severe sociopath" who would "continue his previous behavior," whose sociopathic condition would "only get worse," and who would "go ahead and commit other similar or same criminal acts if given the opportunity to do so").

In addition, the record reflects that Dr. Fason's diagnosis drew primarily from sources other than his examination of Penry. Although Dr. Fason included the examination in his diagnosis, he disagreed that the diagnosis was made "on the basis of" the interview. (S.F. Vol. 46, p. 820). Dr. Fason had also reviewed Penry's "rather extensive" medical records in reaching his conclusions. Dr. Fason testified on redirect examination that his diagnosis of Penry's antisocial personality was his "impression, diagnostic impression, and that is based on review of all of the records." (*Id.*, p. 829). *See Woods*, 75 F.3d at 1028-30 (the psychiatrist's limited opinion concerning the defendant's future dangerousness was based primarily on a hypothetical given by the prosecutor); *Savino v. Murray*, 82 F.3d 593, 605-06 (4th Cir. 1996) (finding harmless

error when the expert "said he reviewed numerous outside materials" in diagnosing the defendant).

Finally, Dr. Fason's testimony was a very small part of the prosecution's evidence of Penry's future dangerousness. Two other experts, Drs. Quijano and Samenow, testified far more extensively and unequivocally than Dr. Fason that Penry would be a future danger. Dr. Quijano testified during the sentencing phase that Penry was "likely to engage in continuing acts of violence in the future." (S.F. Vol. 50, p. 1654). Dr. Samenow testified that the possibility that Penry's antisocial behavior would change "would be pretty bleak." (*Id.*, p. 1736). The prosecution also presented testimony during the sentencing phase from five prison guards and a deputy sheriff that Penry had committed violent and aggressive acts while in custody and had a reputation for being dangerous. Four of the prison guards specifically testified that they believed Penry would be a future danger. (S.F. Vol. 47, pp. 970, 983, 1008-09, 1157-60). The prosecution also presented Penry's 1977 aggravated rape conviction and testimony from the victim, as well as testimony from the woman Penry identified in his confession as someone he wanted to rape.

In his closing argument, the prosecutor relied far more heavily on evidence of Penry's dangerousness other than Dr. Fason's testimony. The prosecutor made only a brief reference to Dr. Fason's testimony to support his argument as to Penry's future

dangerousness. *See Woods*, 75 F.3d at 1032 (noting that the objectionable references to the psychiatrist's testimony constituted less than ten percent of the prosecutor's closing argument).

The aggravated nature of Penry's crime, the inculpatory and remorseless statements in his confessions, and Penry's other violent acts, all supported the prosecution's future dangerousness argument. In *Woods*, the court found that admission of the psychiatrist's testimony was harmless error, in part because "[t]he real strength of the prosecution case on future dangerousness was the nature of the crime itself . . . coupled with the [previous] conviction and fifteen-year sentence for attempted aggravated rape." *Id.*; *see also Savino*, 82 F.3d at 605 ("At sentencing, the Commonwealth presented compelling evidence of Savino's prior criminal record and his own statements of his criminal history. The nature of the crime and the circumstances surrounding it certainly revealed viciousness and dangerousness.").

This court concludes that the admission of any testimony by Dr. Fason that could be characterized as evidence of Penry's future dangerousness did not have a "substantial and injurious effect" on the jury's verdict. Even if this court were to determine that Dr. Fason's testimony violated the Supreme Court's decision in *Estelle v. Smith*, the court would conclude that the error was harmless. The court DENIES Penry's *Estelle* claim.

VIII. The Exclusion of Evidence of Shirley Penry's Mental Illness (Claim VI)

During the sentencing phase of his retrial, Penry offered two hospital records documenting post-partum psychotic, schizophrenic behavior by Shirley Penry, Penry's mother. The trial court excluded the documents. (S.F. Vol. 49, pp. 1561-65). Penry argues that the trial court's exclusion of the evidence violated his constitutional rights by preventing the jury from hearing and considering relevant mitigating evidence.

The Court of Criminal Appeals upheld the trial court's exclusion of the evidence as irrelevant, finding that "the records did not discuss whether [Penry's] mother abused any of her children, or even whether her mental condition made it likely that she would abuse her children. There was no evidence that her psychological problems would have led to child abuse." *Penry*, 903 S.W.2d at 762. The determination by the state appellate court that the evidence was irrelevant is not an unreasonable application of clearly established federal law and cannot provide a basis for granting Penry federal habeas relief under the AEDPA.

A state trial court's ruling that the proffered testimony is inadmissible is entitled to deference by a federal habeas court. *See Panzavecchia v. Wainwright*, 658 F.2d 337, 340 (5th Cir. 1981) ("[F]ederal courts are compelled to defer to a state court's interpretation of its own criminal laws, rules of evidence and rules of criminal procedure." (citing *Spencer v. Texas*, 87 S. Ct. 648 (1967))); *see also Little v. Johnson*,

APPENDIX C

DECISION OF THE UNITED STATES COURT OF APPEALS DENYING MOTIONS FOR PANEL REHEARING AND REHEARING *EN BANC*

PWRW & G

JUL 27 2000

☑ DOCKETED
☑ IMAGED

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

U.S. COURT OF APPEALS
FILED
JUL 25 2000
CHARLES R. FULBRUGE III
CLERK
Iss'd 7/26 MRW

No. 99-20868

U.S. COURT OF APPEALS
RECEIVED
JUL 25 2000
NEW ORLEANS, LA

JOHNNY PAUL PENRY

Petitioner-Appellant,

VERSUS

GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas, Houston Division

On Petition for Rehearing

Before DAVIS, EMILIO M. GARZA, and DENNIS, Circuit Judges.

W. EUGENE DAVIS, Circuit Judge:

In his petition for rehearing, Penry contends for the first time that Battie v. Estelle, 655 F.2d 692 (5th Cir. 1981), controls the admissibility of the Peebles report. Battie was decided before Buchanan v. Kentucky, 483 U.S. 402, 107 S.Ct. 2906 (1987), and we explained in Schneider v. Lynaugh, 835 F.2d 570 (5th Cir. 1988), how Buchanan controls this issue when an accused requests an examination, particularly when he puts his mental status at issue. In Schneider, we stated that:

> Schneider requested the competency examination. Before Buchanan, we held that this fact "[did] not obviate the necessity for giving the Miranda warnings" when the examination extended beyond the subject of competency. (Battie, 655 F.2d at 702-3). The Court in Buchanan, however, regarded such a request as militating against the defendant's assertion of the privilege, for it stated that "if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested."

835 F.2d at 577.

Because Schneider, rather than Battie, controls our decision on this issue, we DENY Penry's petition for panel rehearing.

Judge Dennis would GRANT the motion for panel rehearing.

No judge in regular, active service on the court having requested that the court be polled on Rehearing En Banc, (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

W. Eugene Davis
United States Circuit Judge

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APPENDIX D

DECISION OF THE UNITED STATES DISTRICT COURT

DENYING MOTION TO ALTER AND AMEND JUDGMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

AUG 13 1999

Michael N. Milby, Clerk of Court

JOHNNY PAUL PENRY,	§	
	§	
Petitioner,	§	
	§	
VS.	§	CIVIL ACTION NO. H-97-4094
	§	
GARY L. JOHNSON,	§	
Director, Texas Department of	§	
Criminal Justice, Institutional Division,	§	
	§	
Respondent.	§	

MEMORANDUM AND OPINION

In a March 29, 1999 Memorandum and Order, this court analyzed the petition for writ of habeas corpus filed by petitioner, Johnny Paul Penry, and granted summary judgment in favor of respondent, Gary L. Johnson, Director of the Texas Department of Criminal Justice—Institutional Division, on each of Penry's claims. (Docket Entry No. 33). Following a detailed review of Penry's arguments, this court determined that Penry was not entitled to a Certificate of Appealability ("COA").

Penry has filed a motion to alter and amend the judgment and a brief in support. (Docket Entry Nos. 36, 37). Based on the motion, the brief, this court's March 29, 1999 Memorandum and Order, and the applicable law, this court DENIES Penry's motion to alter and amend the judgment. The reasons are stated below.

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I. The Motion to Alter and Amend the Judgment

Penry raises two grounds: (1) this court applied an impermissibly restrictive standard in denying Penry a COA; and (2) this court erred in its legal analysis of Penry's "mitigation instruction" claim.

A. The Legal Standard for Granting a COA

The law is clear that a COA issues if the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also United States v. Kimler*, 150 F.3d 429, 431 (5th Cir. 1998). "A petitioner can meet this burden by demonstrating that 'the issues [presented] are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further.'" *Little v. Johnson*, 162 F.3d 855, 859 (5th Cir. 1998) (alteration in original) (quoting *Barefoot v. Estelle*, 103 S. Ct. 3383, 3394-95 & n.4 (1983)), *cert. denied*, 119 S. Ct. 1768 (1999). "The nature of the penalty in a capital case is a 'proper consideration in determining whether to issue a [COA], but the severity of the penalty does not in itself suffice to warrant the automatic issuing of a certificate.'" *Id.* (quoting *Barefoot*, 103 S. Ct. at 3394-95).

Penry's disagreement is not with this court's statement of the legal standard for granting a COA, but rather the application of that standard. In its prior

Memorandum and Order, this court found that "Penry has failed to make a 'substantial showing of the denial of a constitutional right'" "because . . . each of his claims is foreclosed by clear, binding precedent, often recently decided." (Docket Entry No. 33, p. 156). Penry asserts that the merits of some of his claims are "debatable among jurists of reason" because support for these claims has come from "Judges and Justices from the Supreme Court, Fifth Circuit, and the Texas Court of Criminal Appeals," although the support is found only in concurring and dissenting opinions. (Docket Entry No. 37, p. 4).[1] Penry argues that "[t]o deny [him] a certificate of appealability is implicitly to call into question the reasonableness of some of the country's greatest legal minds." (*Id.*).

Penry's approach to the legal standard for the issuance of COAs overstates the basis, and understates the purpose, of a COA. Courts deny COAs on issues that have sparked vigorous disagreement among judges, but have been decided, even without consensus among all "jurists of reason."

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[1] Penry identifies the following jurists as those supporting his "most important claims": *Brown v. Texas*, 118 S. Ct. 355 (1997) (Stevens, J.; Souter, J.; Ginsburg, J.; Breyer, J.) (respecting the denial of the petition for writ of certiorari); *Whitaker v. State*, 977 S.W.2d 595, 601-02 (Tex. Crim. App. 1998) (Price, J., concurring), *cert. denied*, 119 S. Ct. 878 (1999); *May v. Collins*, 904 F.2d 228, 232-33 (5th Cir. 1990) (Reaveley, J. and King, J., concurring). (Docket Entry No. 37, p. 4).

In *Little v. Johnson*, the petitioner requested a Certificate of Probable Cause ("CPC")[2] on a due process claim based on the admission of psychiatric testimony on the potential for future dangerousness in the sentencing phase of his capital trial. The testimony was based on a hypothetical set of facts. *See* 162 F.3d at 862-63. The Fifth Circuit declined to issue the CPC, despite the fact that three Supreme Court justices--Justices Blackmun, Brennan, and Marshall--had previously found that such psychiatric testimony was constitutionally defective. *See Barefoot*, 103 S. Ct. at 3406-18 (Blackmun, J., dissenting).

In *Trevino v. Johnson*, 168 F.3d 173, 180 (5th Cir. 1999), *petition for cert. filed*, -- U.S.L.W. -- (U.S. June 17, 1999) (No. 98-9936), the petitioner requested a COA on his claim that his state habeas proceedings violated his due process rights. The Fifth Circuit did not grant the petitioner the COA, because "[o]ur circuit precedent makes clear that [petitioner's] 'claim fails because infirmities in state habeas proceedings do not constitute grounds for relief in federal court.'" *Id.* at 180 (quoting *Hallmark v. Johnson*, 118 F.3d 1073, 1080 (5th Cir.), *cert. denied sub*

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[2] In Section 102 of the AEDPA, Congress amended 28 U.S.C. § 2253 to provide that a COA, rather than a CPC, is the appropriate mechanism for allowing a habeas petitioner to appeal a final judgment from a federal district court. "The standard for obtaining a COA is the same as for a CPC." *Muniz v. Johnson*, 114 F.3d 43, 45 (5th Cir. 1997); *Murphy v. Johnson*, 110 F.3d 10, 11 (5th Cir. 1997). However, "a COA, unlike a CPC, must 'indicate which specific issue or issues satisfy the showing required . . . .'" *Murphy*, 110 F.3d at 11 n.1 (quoting 28 U.S.C. § 2253(c)(3)).

nom. Johnson v. Monroe, 118 S. Ct. 576 (1997)). The Fifth Circuit observed that five of the six circuits that had considered the issue had arrived at the same conclusion. *See id.* The fact that a United States court of appeals had disagreed did not prevent the Fifth Circuit from denying the petitioner a COA.

In *Castillo v. Johnson*, 141 F.3d 218 (5th Cir.), *cert. denied*, 119 S. Ct. 28 (1998), the petitioner claimed that his federal constitutional rights were violated by the state trial court's exclusion of polygraph evidence, a decision based on a state law *per se* bar on such evidence. Citing *United States v. Sheffer*, 118 S. Ct. 1261 (1998), the Fifth Circuit found that a *per se* rule against the admission of polygraph evidence did not violate the Fifth or Sixth Amendment rights of the accused to present a defense. *See id.* at 222. The Fifth Circuit declined to issue the petitioner a CPC, notwithstanding the fact that Justice Stevens dissented from the Supreme Court's opinion approving a *per se* bar on polygraph evidence. *See Sheffer*, 118 S. Ct. at 1270-79 (Stevens, J., dissenting).

In *Barber v. Johnson*, 145 F.3d 234 (5th Cir.), *cert. denied*, 119 S. Ct. 518 (1998), the petitioner had been convicted of capital murder and sentenced to death. The petitioner petitioned for state habeas relief, asserting error in the admission of certain psychiatric testimony. The Texas Court of Criminal Appeals denied that relief because it found any error to be harmless. *See Barber v. State*, 757

S.W.2d 359 (Tex. Crim. App. 1988). The petitioner unsuccessfully sought habeas relief in federal district court. In his appeal to the Fifth Circuit, the petitioner complained that the Texas Court of Criminal Appeals and the district court mistakenly applied the harmless error standard articulated in *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993), rather than the standard set out in *Chapman v. California*, 87 S. Ct. 824 (1967). Noting that a prior panel, *Hogue v. Johnson*, 131 F.3d 466 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1297 (1998), had already decided the issue, the Fifth Circuit denied the petitioner's request for a CPC, even though the "holding in *Hogue* may be viewed as inconsistent with the Supreme Court's underlying reasoning for applying the *Brecht* standard in federal habeas review." *Barber*, 145 F.3d at 236. The *Barber* court disagreed with the holding of a prior Fifth Circuit panel, yet declined to issue a CPC because the prior panel's decision was binding. *See id.* at 237.

In *Boyd v. Johnson*, 167 F.3d 907 (5th Cir. 1999), *cert. denied*, -- S. Ct. --, 1999 WL 412897 (U.S. Aug. 5, 1999), the Fifth Circuit considered the petitioner's request for a CPC on his *Simmons* claim.[3] Penry asserted a similar cla in this case

[3] In *Simmons v. South Carolina*, 114 S. Ct. 2187, 2190 (1994), the Supreme Court held that when a capital murder defendant would be ineligible for parole under state law if sentenced to life imprisonment, and the prosecution argues that the defendant would be dangerous in the future, due process requires the jury to be informed that the defendant would be ineligible for parole. The Fifth Circuit has rejected the extension of the *Simmons* rule to a Texas capital defendant. *See*

and now argues that it is especially worthy of a COA. The Fifth Circuit denied the request for a CPC in *Boyd*. In *Boyd*, as in this case, petitioner asserted that the trial court erred by permitting the prosecutor to argue future dangerousness while denying petitioners the opportunity to present evidence and argue that if the jury imposed a sentence, parole would not be likely. In *Boyd*, as in this case, petitioner relied on a dissent from the denial of *certiorari* in *Brown v. Texas*, 118 S. Ct. 355 (1997) (Stevens, J., dissenting from the denial of the petition for a writ of *certiorari*). Four justices joined in the dissent. In the dissenting opinion, Justice Stevens noted the "obvious tension" between *Simmons* and the refusal by the State of Texas to allow a defendant to give the jury truthful information about his parole eligibility, observing that this tension made the Texas capital punishment scheme "especially troubling." *See id.* at 355-56. The *Boyd* court declined to grant a CPC on the *Simmons* claim, despite the dissent by four members of the Supreme Court from the denial of petition for a writ of *certiorari* in *Brown*. *See* 167 F.3d at 912-13.

Penry's argument would appear to require that a COA issue in every appeal from a denial of habeas in a capital case. There have been, and are, individuals and jurists of reason who find capital punishment unconstitutional in any

Allridge v. Scott, 41 F.3d 213, 222 (5th Cir. 1994). Under Texas law, a capital defendant is not legally ineligible for parole. The Fifth Circuit held that *Simmons* applies only to situations in which the defendant is "legally ineligible" for parole. *Id.* at 222.

case, as a violation of basic moral standards of decency. Penry echoed this argument in his habeas petition, particularly as applied to the execution of those with the impairments Penry presents. However, it is clear that the disagreement by jurists of reason over the constitutionality of capital punishment does not require a COA in every capital case.

COAs should be granted on an issue presented in the habeas petition that is not settled. *See Drinkard v. Johnson*, 97 F.3d 751, 756 n.6, 770 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1114 (1997), *overruled on other grounds by Lindh v. Murphy*, 117 S. Ct. 2059 (1997).[4] However, habeas petitioners cannot obtain a COA by finding support for their claims in concurring or dissenting opinions, in the face of binding majority decisions adverse to their claims.

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[4] There is some authority suggesting that a significant circuit split might also warrant the issuance of a COA, even when there is binding authority in the circuit of the court considering the COA request.

In *Lozada v. Deeds*, 111 S. Ct. 860 (1991) (per curiam), a Nevada District Court and the Ninth Circuit denied the petitioner's request for a CPC. *See* 111 S. Ct. at 861. The Supreme Court found that the Ninth Circuit erred in denying the petitioner a CPC, because at least two circuit courts had resolved the habeas claim at issue in a different manner. *See id.*

In *Lynce v. Mathis*, 117 S. Ct. 891 (1997), the petitioner's request for a CPC on his *ex post facto* claim had been denied by a Florida district court based on clear Florida and Eleventh Circuit precedent. *See* 117 S. Ct. at 893. The Eleventh Circuit also denied the petitioner a CPC in an unpublished order. Noting that the Tenth Circuit had "reached a different conclusion on similar facts," the Supreme Court granted certiorari and reversed the Eleventh Circuit. *See id.*

This court does not reach the issue of whether this situation requires the issuance of a COA. None of Penry's claims is supported by a binding majority decision of any circuit court.

Penry's claims are foreclosed by clear, binding Fifth Circuit precedent. His claims have not attracted the support of a majority in any other circuit. Penry is not entitled to a COA as to such issues.

B. The Mitigation Instruction Claim

In Penry's federal habeas challenge to his first trial and conviction, the Supreme Court granted relief after finding that none of the three special issues set out in article 37.071(b) of the Texas Code of Criminal Procedure provided a means for the jury to give effect to Penry's mitigating evidence. *See Penry v. Lynaugh*, 109 S. Ct. 2934, 2949 (1989) ("*Penry I*"). During the sentencing phase of Penry's retrial, the jury was again asked to answer the same special issues.[5] In the retrial, however,

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[5] The special issues that the jury was asked to answer included:

Special Issue No. 1
Was the conduct of the defendant, JOHNNY PAUL PENRY, that caused the death of the deceased, PAMELA CARPENTER, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

Special Issue No. 2
Is there a probability that the defendant, JOHNNY PAUL PENRY, would commit criminal acts of violence that would constitute a continuing threat to society?

Special Issue No. 3
Was the conduct of the defendant, JOHNNY PAUL PENRY, in killing PAMELA CARPENTER, the deceased, unreasonable in response to the provocation, if any, by the deceased?

(Trans. Vol. 5, pp. 1330-31).

the trial judge provided the jury with an instruction on how to incorporate Penry's mitigating evidence into its sentencing decision. In this habeas challenge, Penry claims that this instruction was insufficient to cure the constitutional deficiencies identified by the Supreme Court in *Penry I*.

This court analyzed the jury instruction, Penry's presentation of extensive mitigating evidence, and defense counsel's jury arguments. In *Emery v. Johnson*, 139 F.3d 191 (5th Cir. 1997), *cert. denied*, 119 S. Ct. 418 (1998), the Fifth Circuit had approved an instruction similar to the one at issue in Penry's retrial.[6] This court held that in the sentencing phase of Penry's second trial, the jury was able to

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[6] In *Emery*, the jury was instructed as follows:

> [Y]our answers to the Special Issues, which determine the punishment to be assessed the defendant by the court, should be reflective of your finding as to the personal moral culpability of the defendant in this case.
> When you deliberate about the questions posed in the Special Issues, you are to consider any mitigating circumstances supported by the evidence presented in both phases of the trial. A mitigating circumstance may be any aspect of the defendant's background, character, and record, or circumstances of the crime, which you believe makes a sentence of death inappropriate in this case. If you find that there are any mitigating circumstances, you must decide how much weight they deserve and give them effect when you answer the special issues. If you determine, in consideration of this evidence, that a life sentence, rather than a death sentence, is an appropriate response to the personal moral culpability of the defendant, you are instructed to answer the Special Issue under consideration "No".

Emery, 139 F.3d at 200.

give "constitutionally sufficient consideration to Penry's mitigating evidence." (Docket Entry No. 33, p. 24).

Penry now asks this court to reconsider its ruling. Penry asserts that jury instruction given in his retrial was defective in that it did not place his mitigating evidence within the effective reach of the jury; that the defects in the jury instruction were not present in the instruction at issue in *Emery*; and that these defects could not be cured by arguments of counsel or by the presentation of mitigating evidence.

In Penry's retrial, the trial court gave the following instruction to the jury:

> You are instructed that if you return an affirmative finding on each of the special issues submitted to you, the court shall sentence the defendant to death. You are further instructed that if you return a negative finding on any special issue submitted to you, the court shall sentence the defendant to the Texas Department of Corrections for life. You are therefore instructed that your answers to the special issues, which determine the punishment to be assessed the defendant by the court, should be reflective of your finding as to the personal culpability of the defendant, JOHNNY PAUL PENRY, in this case.
>
> You are instructed that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which

> you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

(Trans. Vol. 5, p. 1329).

Penry asserts that this instruction has two flaws not present in the jury instruction given in *Emery*.[7] First, Penry's jury was instructed to give a negative finding to one of the special issues only if the jury determined that a "life sentence . . . , rather than a death sentence, is an appropriate response to the *personal culpability* of the defendant." (*Id.* (emphasis added)). The *Emery* instruction, by contrast, asked the jury to consider the "personal *moral* culpability" of the defendant. Penry asserts that the phrase "personal culpability of the defendant," without the word "moral," might lead the jurors to believe that they could "only consider whether

[7] To the extent that Penry's claim rests on a challenge to the constitutionality of a "nullification instruction," rather than on the differences between his instruction and the one given in *Emery*, this claim is foreclosed by *Emery*. *See Emery*, 139 F.3d at 199-200; *Gribble v. Johnson*, 8 F. Supp. 2d 942, 956-57 (S.D. Tex. 1998); *see also Wheatfall v. State*, 882 S.W.2d 829, 841 (Tex. Crim. App. 1994); *Coble v. State*, 871 S.W.2d 192, 206 (Tex. Crim. App. 1993) (en banc); *Fuller v. State*, 829 S.W.2d 191, 209 (Tex. Crim. App. 1992).

Penry is 'personally' culpable, or responsible, for the crime itself– not whether there is anything in the 'defendant's background, character, or other circumstances that reflect a reduced *moral* capability.'" (Docket Entry No. 37, p. 17 (quoting *Boyd v. Johnson*, 167 F.3d 907, 911 (5th Cir. 1999))).

The Supreme Court in *Penry I* approved the use of the term "personal culpability" with reference to mitigating evidence. The Court noted that a jury must be able to consider and give effect to mitigating evidence "because the punishment should be directly related to the *personal culpability* of the defendant." *Penry I*, 109 S. Ct. at 2951 (emphasis added). In addition, in the following passage, the Court used the concepts of personal culpability and moral culpability interchangeably:

> *Personal culpability* is not solely a function of a defendant's capacity to act "deliberately." A rational juror at the penalty phase of the trial could have concluded, in light of Penry's confession, that he deliberately killed Pamela Carpenter to escape detection. Because Penry was mentally retarded, however, and thus less able than a normal adult to control his impulses or to evaluate the consequences of his conduct, and because of his history of childhood abuse, that same juror could also conclude that Penry was *less morally "culpable* than defendants who have no such excuse," but who acted "deliberately" as that term is commonly understood.

Penry I, 109 S. Ct. at 2949 (emphasis added) (citing *California v. Brown*, 107 S. Ct. 837, 841 (1987) (O. Connor, J., concurring)). The absence of the word "moral" in Penry's instruction does not make the instruction constitutionally defective.

Penry also challenges the last sentence of the jury charge as constitutionally defective. The judge instructed the jury that: "[i]f you determine, when giving effect to the mitigating evidence, if any, that a life sentence, *as reflected by a negative finding to the issue under consideration,* rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues." (Trans. Vol. 5, p. 1329) (emphasis added). Penry argues that the phrase, "as reflected by a negative finding to the issue under consideration," a phrase not found in the *Emery* jury charge, "brings the Penry violation around full-circle to what it was in Penry I. If, according to the court's instruction, a life sentence is only appropriate if there is a 'negative finding to the issue under consideration,' then Penry might as well not have had a Penry instruction, because the instruction only allows the jury to grant a life sentence if the honest answer to one of the three special questions is 'no.'" (Docket Entry No. 37, pp. 17-18).

The Supreme Court has admonished that courts are "not [to] engage in a technical parsing of this language of the instructions, but instead approach the

instructions in the same way that the jury would—with a 'commonsense understanding of the instructions in the light of all that has taken place at the trial.'" *Johnson v. Texas*, 113 S. Ct. 2658, 2669 (1993) (quoting *Boyde v. California*, 110 S. Ct. 1190, 1198 (1990)). The standard for determining whether instructions adequately permit a jury to consider and give effect to mitigating evidence is "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.'" *Buchanan v. Angelone*, 118 S. Ct. 757, 761 (1998) (quoting *Boyde*, 110 S. Ct. at 1198). Penry need not prove that "it was more likely than not that the jury was prevented from giving effect to the [mitigating] evidence, [but] the standard requires more than a mere possibility of such a bar." *Johnson v. Texas*, 113 S. Ct. at 2669.

Before reaching the disputed sentence, the trial court informed the jury that:

> You are instructed that if you return an affirmative finding on each of the special issues submitted to you, the court shall sentence the defendant to death. You are further instructed that if you return a negative finding on any special issue submitted to you, the court shall sentence the defendant to the Texas Department of Corrections for life. You are therefore instructed that *your answers to the special issues, which determine the punishment to be assessed the defendant by the court, should be reflective of*

your finding as to the personal culpability of the defendant, JOHNNY PAUL PENRY, in this case.

You are instructed that *when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case.* If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, *give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue.*

(Trans. Vol. 5, p. 1329) (emphasis added). Examining the charge in its entirety, the last sentence told the jury how to effectuate a life sentence, if that was the punishment the jury deemed appropriate in light of Penry's mitigating evidence. The charge as a whole removes the confusion resulting from viewing the challenged phrase in isolation.

"Even were [this court] to entertain some doubt as to the clarity of the instructions, [this court held that] the entire context in which the instructions were given expressly informed the jury that it could consider mitigating evidence." *Buchanan*, 118 S. Ct. at 762. This court analyzed Penry's counsel's closing arguments in the sentencing phase of the trial, as well as the presentation of Penry's

extensive mitigating evidence in both the guilt and sentencing phases of the trial. Penry now asserts that this court erred in considering these factors.

The Supreme Court has held that constitutionality of jury instructions depends upon "the entire context in which the instructions were given." *Buchanan*, 118 S. Ct. at 762; *see also Boyde*, 110 S. Ct. at 1199-1200. As Penry concedes, (Docket Entry No. 37, p. 11), and as both the Supreme Court and Fifth Circuit have held, jury arguments explaining how mitigating evidence can or should be considered in sentencing are part of this "context" and can affect whether the jury likely applied the instructions so as to present consideration of relevant mitigating evidence. *See Buchanan*, 118 S. Ct. at 762-63; *Drinkard*, 97 F.3d at 761 n.16 ("The arguments of counsel are relevant to a jury's interpretation of challenged jury instructions, but the court's instructions carry substantially more weight."). Penry correctly observes that the arguments of counsel cannot cure an otherwise unconstitutional jury charge. However, as explained above, that situation was not present here. In this case, the jury received constitutional jury instructions that were further clarified by the arguments of Penry's counsel. This court properly considered these jury arguments in examining the "entire context in which the instructions were given."

Penry also argues that this court erred in stating that Penry's presentation of extensive mitigating evidence would likely convey to the jury that they may take

the evidence into account in sentencing. Three times in the last decade, the Supreme Court has held that the defendant's presentation of mitigating evidence is relevant to determining how a jury would understand a given instruction. *See Buchanan*, 118 S. Ct. at 762-63 ("[T]here were two days of testimony relating to petitioner's family background and mental and emotional problems. It is not likely that the jury would disregard this extensive testimony in making its decision, particularly given the instruction to consider 'all the evidence.'"); *Johnson v. Texas*, 113 S. Ct. at 2669 ("It strains credulity to suppose that the jury would have viewed the evidence of petitioner's youth as outside its effective reach in answering the second special issue."); *Boyde*, 110 S. Ct. at 1199-1200 ("All of the defense evidence presented at the penalty phase–four days of testimony consuming over 400 pages of trial transcript–related to petitioner's background and character, and we think it unlikely that reasonable jurors would believe that the court's instructions transformed all of this favorable testimony into a virtual charade.") (internal quotation omitted).[8]

This court recognizes that the presentation of mitigating evidence alone cannot cure a *Penry* error. Under that approach, Penry would not have been entitled

[8] The position Penry takes in this case has been presented only in a dissenting opinion. *See Buchanan*, 118 S. Ct. at 766 (Breyer, J., dissenting) ("[T]he presentation of evidence does not tell the jury that the evidence presented can be taken into account–particularly in the context of an instruction that seems to exclude the evidence from the universe of relevant considerations.").

to habeas relief in his first habeas challenge. As the *Boyde* Court explained: "[p]resentation of mitigating evidence alone, of course, does not guarantee that a jury will feel entitled to consider that evidence. But the introduction without objection of volumes of mitigating evidence certainly is relevant to deciding how a jury would understand an instruction which is at worst ambiguous." *Boyde*, 110 S. Ct. at 1200.

Penry attempts to distinguish *Buchanan*, *Johnson*, and *Boyde* by pointing to a passage in *Johnson*, in which the Court distinguished *Penry I*. The *Johnson* Court observed that in that case, the petitioner's mitigating evidence was relevant to the second special issue, while in *Penry I*, Penry's mitigating evidence could not be given effect under the special issues. *See* 113 S. Ct. at 2669-70. This distinction applied to Penry's first trial, not his second. During Penry's retrial, the jury instructions brought Penry's mitigating evidence within the effective reach of the jury. The Supreme Court has expressly instructed courts to consider the nature and extent of the mitigating evidence presented in "deciding how a jury would understand an instruction which is at worst ambiguous." *Boyde*, 110 S. Ct. at 1200.[9]

[9] This court recognizes that the approach is inherently somewhat circular. While courts are to consider the overall context in which jury instructions are given (including the jury arguments and the presentation of mitigating evidence) in deciding whether a jury instruction is constitutional, courts must make a preliminary finding that the challenged instruction is constitutional, or at worst ambiguous, before considering these factors. The only way to avoid this potential circularity is to assume that the overall context can only be considered when jury instructions are ambiguous, not when instructions are facially unconstitutional.

This court finds that there was not "a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence" and DENIES Penry's motion to alter and amend the judgment on his mitigation instruction claim.

II. Conclusion

This court DENIES Penry's motion to alter and amend the judgment.

SIGNED on August 12 1999, at Houston, Texas.

Lee H. Rosenthal
United States District Judge

APPENDIX E

CONSTITUTIONAL PROVISIONS AT ISSUE

CONSTITUTIONAL PROVISIONS AT ISSUE

AMENDMENT V TO THE UNITED STATES CONSTITUTION

(relevant provision emphasized)

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

AMENDMENT VIII TO THE UNITED STATES CONSTITUTION

(relevant provision emphasized)

Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted*.

AMENDMENT XIV, SECTION 1 TO THE UNITED STATES CONSTITUTION

(relevant provision emphasized)

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law*; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX F

PENALTY PHASE TESTIMONY OF:

BELINDA ANDERSON
TRUDY ROSS
JESSE PENRY
LUCILLE ANDERSON

I have no further questions, Your Honor.

REDIRECT EXAMINATION

QUESTIONS BY MR. SMITH:

Q Did you see scars on the scalp, wh. you photographed them?

A Yes, we did.

Q Do you know if those showed up well on the photographs?

A It was a little difficult to tell because of the thickness of the hair.

BY MR. SMITH:

No further questions.

BY THE COURT:

Any other questions?

BY MR. PRICE:

No, Sir.

BY THE COURT:

You can step-down, Mr. Cavenaugh.

Who is your next witness?

BY MRS. LIEB:

Belinda Anderson.

BY THE COURT:

Belinda Anderson. Mrs. Anderson, if you will just raise your right hand and

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be sworn in.

REPORTER'S NOTE: (WHEREUPON THE WITNESS WAS DULY SWORN IN BY THE CLERK.)

BY THE COURT:

Okay. If you will just ·e a seat right there and after you get seated that mic will move around. Sounds like you don't talk very loud, so, you need to pull it up and talk into it so everyone on the jury can hear you. Alright, ma'am.

BELINDA ANDERSON

called as a witness by the Defendant, having first been duly sworn to tell the truth, testified on her oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MRS. LIEB:

Q Please state your name?

A Sally Belinda Anderson.

Q Where do you live?

A Dickinson, Texas.

Q How old are you?

A I am thirty-one.

Q Are you married?

A Yes.

Q Do you know Johnny Paul Penry?

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A Yes.
Q And, what is your relationship with him?
A He is my brother.
Q Are you older or younger?
A I am younger.
Q By how much?
A Two years.
Q Did you have another brother and sister?
A Yes.
Q Now, you have been convicted of a crime, is that right?
A Yes.
Q What was that?
A Burglary of a habitation.
Q Okay. And, in what county was that?
A It was Eighty-Two, Eighty or Eighty-Two.
Q And, how old were you?
A Probably about twenty, maybe.
Q Lets talk about Johnny and his growing up a little bit. Did Johnny go to school?
A Yes.
Q Do you know what grade he attended?
A First grade.
Q Did he attend school after that?
A Yes.

Q Well, lets go back to the first grade. Did he complete the first grade?
A No, he didn't.
Q He did not?
A He did not.
Q And, you said that thereafter, he went to school again?
A Yes.
Q And, where was that?
A Mexia State.
Q What is Mexia State?
A It is a school for the mentally retarded.
Q And, how old was Johnny there at Mexia?
A Close to fifteen, not quite sure on that, but, he was there a couple of years at least, the best I can remember.
Q When you say twelve or fifteen, that was about how old he was?
A Yes.
Q Now, did you and your brothers and sister attend school regularly?
A Repeat that, please.
Q You and your brothers and sisters all went to school?
A Oh, yes.

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Q In the normal course, first grade and on?
A Yes.
Q Now, when Johnny was a little kid, did he learn to read and write?
A No.
Q And, when he got back from Mexia, could he read and write?
A He could spell his name, and I think he could spell cat, and maybe dog.
Q Did you work with him to try to get him to read and write?
A Yes, we all did.
Q Who was that?
A That was my dad, my aunt and us other kids.
Q Do you now know that he can read and write at a relatively low level?
A Yes, from what you told me, yes.
Q Do you think Johnny is retarded?
A Yes.
Q What makes you think that?
A It is hard for him to comprehend things. They don't come easy with him. You have to sit there and talk to him for a while before they actually begin to sink in.
Q Did Johnny spend lots of periods of time locked in

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a room?
A Yes.
Q And, where were you living when that happened?
A We were living on Brew Street in Baycliff.
Q That was before he went to Mexia?
A Yes.
Q How long was he locked in this room?
A From eight hours on up.
Q And, who would lock him in there?
A My mother.
Q And, did you ever let him out?
A During the day while she was at work, yes.
Q I couldn't understand.
A During the day while she was at work, when she went to work, we did let him out.
Q Were you afraid, back then what would happen to you and/or Johnny if she found out that you had let him out?
A Several times she come home early and we got in trouble, Johnny got beat.
Q Would the family have supper together?
A When Daddy was home, we all ate together.
Q Did Johnny participate?
A We all ate together when Daddy was home.
Q How often was Daddy home?

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A Maybe twice a week at supper time. Lots of times he was late coming home.
Q Did he work long hours?
A Yes, he did. He was holding down many jobs, once.
Q And, when he was not there, what would Johnny do about supper?
A He would do without if he wasn't good.
Q How long would he go without supper?
A About five days out of the week.
Q Is there a bathroom in that room?
A No, there wasn't.
Q Could he get to a bathroom?
A No.
Q What would he do about going to the bathroom?
A He would go to the attic and take a poop.
Q But, he could get to the attic from his room?
A Yes, the attic entrance.
Q Did the room smell?
A Yes, it did.
Q From what?
A From urine and bowels.
Q Is your father still alive?
A Yes.
Q What is the state of his health?
A Well, he has had another stroke, and they found

some kind of a tumor or something on his brain. They don't know if it is malignant or not, still running test.
Q Is your mother still alive?
A No.
Q Now, when you had let Johnny out of the room, what sort of things would he enjoy doing?
A We would sit out underneath the fig trees and play cards with him and try to have fun with him, you know.
Q Was your mother affectionate with Johnny?
A No.
Q Ever see her hug him?
A Twice.
Q And, that's it, twice in over the years that you were growing up?
A Yes, ma'am.
Q Did your mother call Johnny names?
A Yes.
Q What words would she use?
A Well, the main thing, was "Blackie Carbon."
Q Why did she use that word?
A She got it off of a commercial, but, she would get hateful like, she was ashamed of him, like she didn't love him or something, you know.

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Q She called him other names?
A Yes, she called him short little bastard, and mother-fucker and all kinds of filthy words.
Q What would the tone of her voice be?
A Hateful.
Q Did you see your mother beat Johnny?
A Yes, I did.
Q How much would she beat him?
A After a while, it was practically an everyday affair.
Q And, was it normal discipline or just a beating?
A It was a beating. Belt buckles, belts, it didn't matter, brooms, toy brooms, sticks and mop sticks, and anything she could lay her hands on, or her feet, stomp on him and stuff, and didn't matter to her.
Q Did she ever threaten to blind him?
A Yes.
Q What would she do?
A He would look at her wrong or something and she would just threaten to scratch his little eyeballs out.
Q Would she do it?
A No, we would stop her. She would put her nails on his face and stuff, and we would stop her.

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Q Did your mother use punishment on him while kneeling?
A That was about an everyday affair, too.
Q How long was Johnny forced to kneel?
A Sometimes, two hours, four hours, - e hours. Always happened while Daddy was at work.
Q What would trigger your mother's beatings of Johnny?
A Pardon me?
Q What would trigger them, the beatings?
A Anything. She could be drinking, could look at her wrong and didn't matter, he would say I love you, Mommy, Anything.
Q You mentioned a time that your mother picked him up?
A Yes.
Q Beat him with a mop that your aunt had given him. Can you describe the mop?
A It was a little mop and broom that my Aunt Jane got him.
Q How big was it?
A It was kiddie size, little biddie short thing.
Q Can you tell me about how many feet it was?
A Probably about two and a half, maybe three.
Q What was it made of?

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A It was wood.
Q And, what did you see your mother do with the mop and broom?
A Beating him with it and breaking it over his head and his back and his legs and where it would hit.
Q What did Johnny say?
A Please stop, Mommy, please, I love you, Mommy. Don't hurt me no more.
Q Do you remember another time when your mother ran hot water on Johnny?
A Yes.
Q Where were you?
A I was sitting on the toilet taking a "pp" and Mama went into Johnny's room and Johnny had wet the bed again and Mama started running hot bath water, and you could see the steam rising up out of the shower. She drug him by the nape of his neck, like a little dog, by the shirt, back of his shirt, and she threw him in the bathtub and she held his head down with his face in the drain, saying, I ought to just drowned you, you little bastard.
Q She said, drowned you, little bastard?
A Just drown you, little bastard.

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Q What did Johnny do?
A He started fighting and that is when she wanted to -- his eyeballs out, pulled him out of the tub.
Q Do you remember another occasion wi the mother forced Johnny to drink his own urine?
A Yes, or he had to go and "pp" and he was banging on the door, wanting out to go to the bathroom.
Q And, how old was Johnny at the time?
A I'm not sure. I think he was about five or six.
Q Five or six?
A But, it woke Mama up, him banging on the door, and Mama come in there, and he said, Mama I have got to "pp" and I am thirsty. So, she made him "pp" in the toilet and she made me go in there and watch.
Q Why did she want you in there to watch?
A I don't. I guess she got a kick out of it or something, I don't know. She always did that.
Q After he went to the bathroom, what did she do?
A She told Trudy to go get her a cup, and she went and got it. I can't remember exactly how she came in, came in with the cup, but, she dipped

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it in the commode and made him drink it and she said that's all your getting for today, so, you had better make it last.

Q How full did she fill the cup?

A She filled it up to the rim.

Q Did Johnny drink it?

A I saw him drink it and I had to go outside of the door.

Q Do you remember on another occasion your mother making your brother eat his own bowel movement?

A Yes, I do.

Q How old was he?

A He was about four or five, then, and I had just had a nightmare and I wanted to crawl in bed with Mama, and Johnny was in the doorway, she was facing Johnny, with our heads up against the wall and she was facing Johnny in the doorway.

Q And, what was Johnny doing?

A He was kneeling on his knees.

Q And, what did she make him do?

A I walked by and I smelled a bad smell and I looked at Johnny and he was sitting there, he was on his knees eating his own bowel movement out of his own drawers.

Q I'm sorry, I didn't hear you.

A He was on his knees, eating his own bowel movement out of his own drawers, his panties.

Q Was he wearing the panties he was eating something out of, or was he wearing a separat pair?

A No, he was wearing a separate pair.

Q What, did he hold the panties?

A He held them in his hand, cupped them in his hands.

Q What was his reaction to that?

A He was holding it and he was looking everywhere but, Mama's direction, he looked like he was really ashamed.

Q What did she do at this time?

A She was sitting there on the bed drinking a Dr. Pepper and watching him.

BY MRS. LIEB:

Pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Are you married, Mrs. Anderson?

A Yes.

Q Do you have children?

A No.

Q Do you recall -- well, you testified that your

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brother went to the first grade, is that right?
A Yes.
Q Do you recall that he actually went through the entire first grade year and failed?
A No, I don't recall.
Q You don't recall that?
A No.
Q Do you recall, or do you know that in the second, -- the second time that he started through the first grade, that the school officials recommended that he be put into a special education class because he was a behavioral problem in school? Do you know anything about that?
A I was down there --
BY MR. SMITH:
Can we approach, Your Honor?
BY THE COURT:
Yes, Sir.
BY MR. PRICE:
Why can't they state their objection, if they have got an objection, from here?
BY THE COURT:
You all can approach the bench.
REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH

BY MR. SMITH:
The Motion in Lemine, Your Honor, he is required to approach before he goes into prior bad acts, and what he is going to do, is to take a lot of hea ay that comes in from Johnny's mother and ask her if she knows, that is just to get it before the jury, and no way is that appropriate.
BY MR. PRICE:
Behavioral problems in the first grade?
BY THE COURT:
Okay. So far, what he has asked I am going to overrule. If you have another objection.
BY MR. SMITH:
Yes, I do.
BY THE COURT:
That objection is overruled.
(END OF CONVERSATION HELD AT THE BENCH.)
Q Do you know whether or not that the reason that he failed the first grade was because of behavioral problems?
A I'm not sure.
Q Ma'am?

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A I'm not sure on that.
Q Okay. Whatever the record shows on that, I guess that would be the way that it would be?
A I know my mom pulled him out.
Q Okay. You think then he was put in special education school down in Dickerson there, put in special education classes?
A I'm not sure on that. All I remember is that the first grade and Mexia.
Q Well, that is a pretty good jump from the first grade, six years old, and how old was he when he went to Mexia?
A He was about twelve, about.
Q Talking about five or six years, you don't know what happened to him in five or six years there?
A He was at home a lot of times.
Q He never did go to school?
A I would think.
Q You don't recall him going to any kind of special education school in Dickerson?
A No, I don't.
Q Okay. You didn't know anything about his problem at school, behavioral problem, as opposed to mental retardation problems, did you know that?
A No.

Q Okay. Do you recall much about when he was in the first grade?
A Very vaguely. I remember Mama took him out because she was mad at him for some reason.
Q Would it surprise you to know that he went the entire year to the first grade, and started the second time around in the first grade, and then, was put in a special education school? Is that the way the memory is?
A No, my memory is just the first grade. I remember Mama pulled him out.
Q Okay. The records indicate the school recommended that he be pulled out because he was such a behavioral problem, he couldn't be controlled at school. Would you disagree with that any?
A I don't know. I was young.
Q That could have happened, then?
A Yeah.
Q Okay.
A Possible.
Q He was put in Mexia and stayed up there about three years didn't he?
A I'm not sure how long he stayed up there. I know it was a while.
Q I think you testified a while ago, that he was

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how old when he went in Mexia?
A About twelve.
Q He was about how old when he came out?
A Maybe fifteen, I'm not sure.
Q About three years?
A Two or three, I don't know.
Q Your father took him out of Mexia, though, didn't he?
A Yes.
Q They didn't discharge him?
A I'm not sure. Daddy did all of the paperwork, we were kids.
Q You were what, how much younger are you than him?
A Two years.
Q He was fifteen when he came out of there, then, you would be thirteen. You can't remember that?
A No, there is a lot of things I don't remember about my life.
Q But, you can remember all of that abuse that happened when you were two and three years old?
A I had to watch it.
Q I see. But, you don't know anything about when he came out of Mexia?
A I remember we went up there to pick him up, that's

all I know.
Q For Christmas in 1971, and brought him home. Does that sound about right to you?
A I'm not sure on dates.
Q Okay. You remember your father di bring him home?
A Yes.
Q And, he didn't take him back?
A No, he didn't take him back.
Q Do you know why he didn't take him back?
A Well, I thought Johnny was released, I thought that they had called.
Q You didn't know it was because of his homosexual activities?
BY MR. SMITH:
Objection, Your Honor.
BY THE COURT:
Overrule the objection.
BY MR. SMITH:
Move to strike the testimony.
BY THE COURT:
Motion to Strike is denied.
Q Your father never indicated that to you?
A I was young back then, I don't --
Q Thirteen years old?

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A Daddy never discussed things like that with the kids, alot.
Q Okay.
A If that is what --
Q Lets talk about some of this abuse, this horrible abuse.
A He wanted -- mainly he wanted to make up for Johnny, what Johnny lost.
Q Lets talk about back earlier when all of this horrible abuse that you so vividly described to the jury, you remember telling your father about all of that when he would come in?
A The other kids were scared.
Q You never told your father at all about any of that?
A No, I didn't.
Q He doesn't know anything about it to this day does he?
A He does now, after Mama died.
Q Talking about your father a while ago, he is not an invalid or anything is he?
A No, he's not.
Q He is working, isn't he?
A Yes, he is.
Q Where does he work?

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A He works at Walmart.
Q He lives with you, doesn't he?
A Right.
Q What would you say about the proposition that he doesn't know or doesn't agree w: you as to all of this abuse? Have you got an explanation for that?
A All I know is Daddy had a stroke, two strokes, since all of this has happened, and now, he has got the brain tumor in his head, if that is what it is. They are still running test.
Q So, that has caused him to forget about all of this?
A Daddy is going blind in one eye, and he lost half of his memory.
Q I see, the half he lost, I guess, must have been about all of the abuse?
A Daddy didn't know nothing about the abuse until after mom and dad divorced, and us kids got up enough nerve to tell him.
Q How many years did all of this abuse go on?
A Eighteen years because that is how long they were married.
Q I'm talking about your mother, all of this abuse that you just said, told this jury your

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deceased mother perpetrated on this Defendant over here. How many years did that go on?

A Until he was in Mexia State.

Q And, you said that was about twelve years old?

A About.

Q And, your father never knew about it?

A Never knew.

Q How often have you visited Johnny in the last ten years, since he has been in prison?

A Well I have been out of state in California and Arizona, so, it has been hard.

Q How many times have you visited him?

A None.

Q Ma'am?

A None.

Q When did your mother die?

A I think she died back in '80.

Q She has testified for Johnny before, hasn't she?

A Yeah.

Q You haven't, though, have you?

A No.

Q Trudy testified for Johnny before, hasn't she?

A Yes.

Q Would it surprise you that she does not, apparently, did not know anything about all of this

abuse that you just described to the jury?

A Trudy?

Q Right.

A Wrong.

Q She does know about it?

A She does.

Q Okay. But, if she didn't testify about it before, that would be one of those things?

Is it your testimony that your mother would lock Johnny in the room during the day while your father was working?

A Yes.

Q And, when your father would come in at night, what would happen?

A If Johnny didn't have trouble, we would all eat together. Johnny would eat if it was early enough, if supper had already been served or something, Mama would say Johnny has already eaten, make him go without eating.

Q Your father ever talk to Johnny?

A Yes.

Q Johnny didn't tell him about any problems?

A Johnny didn't comprehend much, and Daddy was away alot and he was holding two or three jobs down, plus Mama's foot operation, he was also

looking after her.
Q When was that?
A It was when we were living in Baycliff. I'm not quite sure of the date or time, and all of the abuse was going on, too.
Q Then abuse that you described to this jury at some length there awhile ago, was rather extensive horrible and lasted, based on your testimony, as I understand it, for a period of about twelve years, is that correct?
A Can you repeat that?
Q The abuse that you so vividly described to the jury a few minutes ago, --
A Yes.
Q -- was rather horrible, it was a constant thing that occurred on a regular basis, and lasted for about twelve years, is that correct?
A It was about -- alot constant, about, probably five days out of the week.
Q Okay. And, she would keep him locked in the room all day long, is that correct?
A When us kids were at school, I would imagine that is where Johnny was kept while she was at work.
Q Your testimony about he would be required to use the bathroom in his own room, there, she would

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make him do that?
A No, he wasn't made to do that, just, he would beat on the door, nobody was home, evidently, he would beat on his door, and beat on the door saying I got to go, I got to go, and then, . was forced to use it in his room.
Q Did your mother work during this period of time?
A Yes, she worked, like I said, she managed at times, she managed at one time a Stop and Go.
Q She worked days or nights?
A Sometimes both.
Q Didn't she work alot of nigh shifts during those years?
A I'm not quite sure.
Q You didn't remember that?
A No. I know she worked nights and days, she was managing seven Stop and Go's, she had to visit all of them.
Q She worked quite a bit, too?
A Yes.
Q Okay. I take it you were in school several years during the time that this abuse was going on, were you not?
A Yes.
Q Did you ever report it to anybody at school?

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A We were afraid back then. Back then, child abuse didn't seem like it was legal, because everybody was getting it. It is more open and out in the area now.
Q So, I take it, the answer to my question is you did not?
A I did not.
Q Okay. You didn't tell your father about it, either, your own father about it either?
A We were afraid.
Q Afraid of who?
A Mom.
Q Okay. Afraid to tell your father because you were afraid of your mother?
A Right.
Q Okay. Where were you convicted of burglary?
A In Granberry, Texas.
Q Burglary of a habitation or burglary of a building?
A Habitation.
Q Okay. First degree felony, isn't it?
A Yes.
Q What kind of punishment did you get for that?
A I got five years probation.
Q When was that?
A It was right after mom died, probably about

'81, '82, something like that.
Q You never told any school officials about it, and you never told your father about it. Who did you ever tell about it?
A We all kept it to ourselves.
Q When was the first time that you ever told anybody about it?
A When mom and dad finally got a divorce, we told Daddy.
Q Told your Daddy at that time?
A Right.
Q When they got a divorce? When was that?
A After eighteen years, I'm not sure, not quite sure the year was.
Q You don't remember when they got a divorce?
A I'm not sure.
Q How old were you?
A In the seventies, sometime, I was about eleven or twelve.
Q That's when you told him?
A Yes.
Q Did he believe it?
A Yes. He bowed his head in his hands and cried.
Q Did your mother do anything physically to Johnny that caused cuts, scars, bruises, whatever, things

of this nature to him?
A He has got scars on the back of his legs, the back of both legs. Asfaras hurting him, if it was an accident, I don't know, because I wasn't born then.
Q That happened when he was two years old, when he got burned in the hot water?
A She claimed it was an accident.
Q So, did your father claim it was an accident, too, didn't he?
A Yes.
Q He was present when that happened, too, he was home when that happened?
A I don't know. I wasn't born.
Q Okay. Aside, -- since your recollection, since you were born, since you remember, you were telling the jury, about all of these bad instances. What I want you to do, is tell me about any instances about where she did anything to him that was physical harm to him, caused bruises, cuts, burns?
A She used to beat him with an extension cord, belt buckles, belts.
Q Did they leave marks on him?
A Broomsticks.
Q That leave marks on him?

A Yes.
Q Bruises on him?
A Bruises.
Q Cuts?
A I'm not sure if he ever got cut. I hink she hit him on top of the head, right on top.
Q Are you telling this jury, this type of activity goes on for ten or twelve years and your father never knew about it?
A My father worked full time.
Q Twenty-four hours a day, seven days a week?
A Not like you and I do now, but, more. He had to walk home, Texas City to Baycliff.
Q He did come home?
A Yes.
Q He did see ya'll occasionally?
A Yes.
Q Weekly I would assume, he would see you two or three days awhile ago, when he would come home for supper two or three times a week?
A In time for supper, I said.
Q And, Johnny would eat with you all, is that correct?
A Johnny would eat with us when Daddy was home for supper.

Q Your father never knew about these beatings and scars?
A No, Mama kept it from him for so long.
Q Was she abusive to you?
A After I had already grown, I think he gave me a bloody nose and black eye, I can't remember which, but, no, I was her favorite.
Q What about the other children?
A I remember her slapping Trudy around, and she broke Jessie's arm, blamed it on me.
Q Broke his arm on purpose?
A She was beating him because he didn't clean the yard up, and slammed the door on him.
Q Anything else?
A He was locked in Johnny's room with Johnny a lot of times, Jessie.
Q Tell your father about that?
A Yes, after Mom and him got a divorce we did.
Q You never told him about Jessie, never even told him when he broke his arm?
A Mama lied to Daddy and blamed it on me, saying he was playing on the coffee table and I pushed Jessie off.
Q Did you tell it different?
A No, we was afraid of Mama.

Q Okay. Your mother and daddy were separated at different times as you were growing up, weren't they?
A Yes, but, asfaras remembering any of them, I don't.
Q But, you know what I am talking about, don't you?
A Yes.
Q She would be gone sometimes for several weeks?
A I know she drank alot and I know she went out maybe one night a week and whatever, and got lost for a night or two, but, she would come back hom.
Q Sometimes she would be gone for several weeks?
A What I heard.
Q You don't remember any of that?
A I don't remember any of those.
Q All you remember is that she was around all of the time?
A I know that she was around. All I remember mostly is bad things that she did to us kids, Johnny, especially.
Q Got a real good recollection of that?
A I sure do, I mean, it sticks in a kid's mind.
Q Yeah, and your father never knew anything about it?

A My Daddy didn't know until after they divorced.

BY MR. PRICE:

I have no further questions.

BY MRS. LIEB:

No questions, Your Honor

BY THE COURT:

Okay. You can step-down. Who is your next witness?

BY MR. SMITH:

Trudy Ross.

BY THE COURT:

Trudy Ross, Mr. Martin.

If you will raise your right hand and be sworn in.

REPORTER'S NOTE: (WHEREUPON THE WITNESS WAS DULY SWORN IN BY THE CLERK.)

BY THE COURT:

Just have a seat. I would ask you after you sit down move that mic to where you can speak into it, so, everyone can hear you. Alright.

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TRUDY ROSS

called as a witness by the Defense, having first been duly sworn to tell the truth, testified on her oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. SMITH:

Q Where do you live, Mrs. Ross?

A I live in Coolridge, Arizona.

Q Married?

A Yes.

Q Children?

A I have three boys.

Q What was your name before you were married?

A Penry.

Q Are you related to Johnny Penry?

A Yes.

Q You are his sister?

A Yes.

Q Older or younger?

A I am older.

Q You are the oldest?

A Yes.

Q How much older than Johnny are you?

A Two years.

Q You grew up with Johnny?

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A Excuse me?

Q Did you grow up with Johnny?

A Yes, I did.

Q You tell the jury whether or not you think that Johnny is mentally retarded?

A Yes, he is.

BY MR. SMITH:

May I approach, Your Honor?

BY THE COURT:

Yes, Sir.

Q I am going to ask you to look at Defendant's Exhibit Number Ten, already in evidence, that has been identified as a photograph of the back of your brother's legs. Do you see the spots of lighter skin on that?

A Yes.

Q Do you recognize those as scars?

A Yes.

Q Did he have those scars when he was growing up?

A Yes, he did.

Q Do you remember any incident in Johnny's childhood that would account for those scars?

A Yes. Can't remember, but, when I was about four he was two, he was scolded in the sink, and then, there was another time, when he was about three

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or four, my mother made him stand on the sink in front of the heater, his legs facing the back of the heater, and I can remember blisters on the back of his legs.

Q Now, when he was scolded in the si[illegible] you said he was two?

A Yes.

Q You were very little, yourself?

A Yes.

Q You have a recollection about it?

A I can remember being frightened and scared and Johnny screaming.

Q Who was scolding him in the sink?

A My mother.

Q Do you remember Johnny going to the hospital after that?

A Yes.

Q You also said that he would kneel in front of the heater. Who made him do that?

A My mother.

Q And, where was she when she was doing this?

A She was in the same room, lying on the bed.

Q And, did he say anything to her?

A He wanted to get up and go you know, away from the heater, and he said that it was hot, she wouldn't

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let him.

Q You say, you remember blisters on his legs?

A Yes.

Q In general, Mrs. Ross, how did your mother treat Johnny?

A She was cruel to him.

Q Did she hit him?

A Yes.

Q What did she hit him with?

A She hit him with a belt, usually, the side with the buckle, and switches, anything that she could find, and slapped him, clawed him, hit him, and one time she broke a child's broom on him, she hit him with it.

Q A child's broom? Do you know who gave Johnny that broom?

A Yes, my dad's youngest sister, Jane, brought him a little broom and mop to keep his room clean with and my mother broke the broom on him.

Q Did she beat him often?

A Yes.

Q How often?

A Quite often. It seemed like he always had fresh marks on his back.

Q Did she ever use cigarettes or anything like

that on him?

A Yes, she would put them to his skin.

Q Did she beat her other children?

A Yes.

Q Did she beat them the same way she at Johnny?

A She was cruel, but, not like with Johnny. It was quite different the way she treated Johnny.

Q Did she seem to have some special feeling about Johnny?

A She had a hatred for him.

Q Did she ever punish Johnny by making him eat or drink anything?

A Yes. She had -- I had witnessed her making him eat his own increment, and also, drinking his own urine.

Q Can you remember specific times when she had made him drink his own urine?

A I can remember when we were out somewhere in the car and Johnny had used the restroom in a coke bottle, and she came out -- he was afraid to go outside of the car and do it, he was really afraid to do anything just, you know, what to do, he was always afraid, and she came out to the car, and she forced him to drink it, and she was real hateful and mean to him, and she even held the

bottle and forced him to drink it.

Q Was Johnny ever kept locked in his room when he was a child?

A Yes.

Q Locked in there for a long time?

A Yes. At this time, it wasn't intentionally that way, it was suppose to be to protect him at night, but, Daddy didn't know that Mama was locking him in all the time and keeping him in there sometime for days without food or water.

Q Did he come out when your father came home?

A When Daddy would come home and he was in time for supper, my mother let him out before Daddy came in, and it was like he hadn't been in there, but, when Daddy would come home, we would eat together and it would be like, things weren't even happening, but, if Daddy didn't come in on time and mother, was the one that came, you know, he didn't come in before supper, late for supper it was like Johnny was put in his room after supper, and he would ask if he had eaten, and Mama would tell him yes, but, he really hadn't.

Q When he was in that room, what was Johnny suppose to do if he had to go to the bathroom?

A Suppose to tell Mama so, she could let him out,

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let him go to the bathroom.

Q Okay. If he didn't tell her, what happened?

A Well, when he had to go, he would beat on the door, Mama would come in there and be real angry at him, she would slam the door and start beating on him wouldn't let him go to the bathroom, and sometimes, she would, and other times, I guess, it all depended on her mood, and then, she would beat him and lock him back in there, and he would go in the room and he would get a whipping, and she seemed to find a reason to go in there and see, find it and would spank him.

Q How did that room smell?

A Atrocious.

Q Do you remember an incident in your childhood, involving a knife?

A Yes.

Q Tell us that story, as you remember it.

A I can remember my mother coming home, she was very enraged, she was home late, late hours of the night, and I can remember -- I don't remember if she started at Johnny first, or if I was the first. I just remember her kicking me and ripping my dress off, and my Dad sending me to my room, and my room was just right across from Johnny's

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and I remember her in there, and she was saying I was going to cut his privates off, so, you won't do this anymore, and she went and got a knife and was actually going to do it.

Q She was going to cut his privates .

A Yes.

Q Did she use the word privates?

A No, she normally used fulgar language, when it concerned Johnny or when she was enraged.

Q You said, she went and got a knife?

A Yes.

Q Did she take that knife into Johnny's room?

A Yes, and I can't remember -- I don't remember how my Dad -- I just know that he was there, and I remember a lamp or some object being crashed to the floor, and I remember my Dad holding her and trying to take the knife from her, and my memory, I can remember him slapping her, but, my Dad was never violent with my mother, this is the only time I can ever remember him being violent with her, and he was trying to reason with her, and I can remember screaming, Johnny was screaming, please, no, Mama, please, and that's it.

Q Could you describe the knife for us?

A I was about this long, had a black handle, and

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it was wide towards the handle and it came to a point at the end of the knife.

Q Did you believe that she was really going to use the knife the way that she said?

A Yes, I was very scared, I was real. scared, I was even screaming.

Q What did your mother use to call Johnny?

A Seems like her favorite was Little Bastard.

Q Did she use that name affectionately?

A No.

Q Did she ever show love to Johnny?

A Sometimes after she had been beating him, which was very seldom that she did do this, but, she would hold him to her and say I'm sorry, Mommy loves you and he would say I know that you love me, I love you too, Mama, and then, there was times when around Dad that she would be a little stand offish, but, show more love towards him than normal, and around other people she would be different.

Q When there was visitors at your house, did her treatment of Johnny change?

A Yes, she always made sure that he had a shirt on whenever there were other people there be like nothing was happening.

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Q Was there a reason that she always made sure that he had a shirt on?
A Yes, because the marks on his back all the time.
Q Was Johnny an affectionate child?
A Yes.
Q Was he loving to his brothers and sisters?
A Yes, he would often, even when Mama would be coming, we would try to put him back in the room, and he would thank us for letting him out and he knew all the time that we were going to get a spanking, and he would take the blame and said that he did it, so, we wouldn't get spanked for it.
Q Is it true, Mrs. Ross, that you testified earlier in this case?
A Yes.
Q You didn't tell all of the details that you are telling now, did you?
A No, I was a little reluctant in dealing with a lot of details.
Q Is there a reason for that?
A Yes.
Q What was the reason?
A My mother was there.
BY MR. SMITH:
Pass the witness.

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CROSS EXAMINATION

QUESTIONS BY MR. PRICE:
Q Mrs. Ross, are you still married?
A Yes, I am.
Q Where do you all live?
A Coolridge, Arizona.
Q Where did your mother live?
A My mother?
Q When she died?
A She was living, I believe in Fort Worth.
Q Fort Worth? Moved back to Texas. Wasn't she living in Arizona about ten years ago, herself?
A I really don't know. My mother lived a lot of places. I wasn't around my mother that much after she left.
Q You had testified before on behalf of your brother, have you not?
A Yes.
Q And, as Counsel just pointed out, you didn't testify about all of these details of abuse at that time, did you?
A No.
Q Are you telling this Court and this jury, now, under oath, that the reason for that was because your mother also happened to be in the same town

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or in the same Courthouse?
A She was in the same Courthouse, yes.
Q So, what effect did that have on you?
A It scared me, it frightened me.
Q When you were in the Courtroom tes. fying, she was outside, she couldn't come in just like this trial, other witnesses can't come in, can they?
A Yes.
Q And, that was the way that it was at that time, wasn't it?
A Yes.
Q But, she didn't know what you were testifying to?
A You know, I would not know if someone, somehow would tell her something. I was afraid.
Q Alright. How old were you then?
A I am thirty-six.
Q You were twenty-six then, I guess?
A About that.
Q Okay. Your father knew about all of this abuse I take it, then, didn't he?
A He was working all the time. He really didn't know the extent of it. He was trying to help mother, he knew that mother had mental problems, and, he tried to help her, he tried to help her.

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Q What is the answer, did he know about the abuse, or didn't he know about the abuse?
A I don't think he knew the extent of it. I really don't know. Working all the time, when he came in, everything was normal, when he uld come home.
Q You are two years older than this Defendant, are you not?
A Yes, Sir.
Q What period of time, over what period of time, did all of this abuse take place, that you recall?
A The first I recall it was when Johnny was scolded, in the sink, that is from the first that I remember that it started.
Q When his legs got burned in the sink?
A Yes.
Q Your father was home when that occurred, wasn't he?
A I don't remember.
Q Ma'am?
A I don't remember.
Q You do not remember that?
A I just remember being frightened, is all that I remember. I remember what happened. I do not remember who let him in or anything, I just don't remember that part.

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Q You remember when he got burned in the sink, is that right?
A Yes.
Q You don't recall how it happened?
A I was only four, barely four, I jus a child myself, I just remember, --
Well, it would just kind of kept kind of quiet, but, I know that my mother was bathing him, he was screaming, I can remember that, and I can remember him coming home from the hospital.
Q Can you also remember that what she did was leave out of the room and he got the water turned on, or not?
A I don't remember.
Q And, he was on the other side of the sink, and he actually got into the water and burned himself?
A No, I don't remember that. I just remember that I was frightened and scared.
Q Well, obviously, anytime anybody is injured like that, you were four years old, that would stand to reason you were frightened. You are not setting here and telling the jury, you are not testifying under oath that she intentionally burned his legs like that are you?
A Yes.

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Q You are telling the jury that?
A So many things that she did do to him.
Q How do you know that?
A Because I saw it.
Q Oh. Maybe I just misunderstood yo testimony. I thought that you said that you couldn't remember anything but, just --
A I saw him there in the sink, with my brother. I said I didn't remember my father being there.
Q But, you remember your mother? What did she do, hold his legs under the water and burn them, is that what she did?
A She was standing there while he was screaming.
Q Ma'am?
A I remember her standing there while he was screaming.
Q Yes ma'am, but, there is a difference between that and if she testified that she had gone out of the room and he got in the hot water and she came running back in the room and got him out of the water and then, she carried him to the hospital?
A She didn't run back to rescue him, no.
Q What do you remember?
A I remember her staying there over him while this

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was happening.

Q So, you are telling this jury, that she just burned him?

A Yes.

Q Okay. But, you didn't tell that u. ır oath the last time that you testified, did you?

A No.

Q Sure didn't. You said she always made sure that he had a shirt on, is that right?

A Yes, she did.

Q Because he had marks on him?

A Yes.

Q What were these marks from?

A From belts, switches, he had claw marks on him, too. My mother had long nails, and she clawed him.

Q Clawed him?

A Yes.

Q And, she hit him with belts?

A Yes.

Q Did they ever cut him?

A Yes, he had deep marks in his back, deep marks.

Q So, she kept shirts on him all the time?

A Yes.

Q You didn't testify about that, before, either, did

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you?

A I don't remember.

Q You haven't read your testimony from before?

A No.

Q You haven't?

A No.

Q Okay.

A I really don't remember what all I said last time.

Q Do you remember testifying before Johnny was mean to his brother, little brother Jesse?

A No, I don't recall.

Q Do you recall that now, that he was mean to Jesse?

A No, Johnny was never intentionally mean.

Q Never was?

A Excuse me?

Q Never was?

A No.

Q I am going to direct your attention back to one time previously that you testified and in response to a question from me, I asked you, "Ms. Penry," and I believe your name was Penry at that time, is that right?

A Yes.

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Q "Isn't it a fact that Johnny Penry was mean towards his younger brother, Jesse, is that correct? "Yes."

A My mother was mean to him, to my younger brother Jesse.

Q The question here was, whether Johnny Penry, this Defendant, was mean to Jesse, and your answer was yes, it was?

A He was never intentionally mean to him.

Q Then, I said, "Did this go on for several years?" And, your answer, "Yes, Sir." "Question, He also had problems with other children in his own peer group or his own age, didn't he? Answer: Yes."

A Well, he was mentally retarded and he was abused at home.

Q Yes, ma'am. I am asking you about violence, now.

A I never said he was mean and cruel to other children. He just didn't act normal around them.

Q Are you saying that this testimony didn't occur, that I just read to you?

A No, but, I am telling you what I meant by what I said.

Q I am just going by just what you were asked and what you answered. You were asked, "Was he mean

towards your brother, Jesse? And, your answer was "Yes," and I asked you then, "Did this go on for several years," and your answer was "Yes, Sir." Also, do you recall testifying about him taking a sharp object and picking the skin off the bottom of his brother's feet? Do you remember that?

A I don't recall testifying to that.

Q You don't? Do you ever recall that you testified that he would get violent at time at home with you all?

A No, I don't.

Q See if this refreshes your recollection. "Question, of course, this information had to be related to the doctor by someone. Would you say that whoever gave that information was in error?" And, we were talking about some information that was given to doctors about child abuse, and you said, "Well, no, because he would get violent sometimes with us at home."

A I don't recall saying that.

Q You don't recall saying that?

A No, Sir.

Q Okay. Do you recall when he got out of prison on that rape charge in 1979?

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A Yes, I recall that.
Q And, you recall that he went to live with his Aunt and Uncle?
A Vaguely. I don't remember everything that happened at that time. I was kept pretty b. myself.
Q Okay. We are not talking about thirty years ago now, we are talking about ten years. Do you remember, that, when he lived with your aunt and uncle for a little while?
A I remember that vaguely.
Q Do you remember that he had to move out from your aunt and uncle's move back in with your father, because they couldn't control him? You remember testifying to that?
A I remember him coming back to live with Dad,
Q Okay. You remember testifying that was because your aunt and uncle couldn't control him?
A They didn't know how to handle Johnny. Not that he was mean or anything, that wasn't the case. They didn't --it was a burden on them.
Q What did your father have to say about that stinking room that he was kept in?
A At what point are you talking about? I don't understand.
Q During the whole time that he was locked in that

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room in your home?
A He said, he would tell Johnny to keep his room clean and to tell Mama when he had to go to the bathroom.
Q He never thought that was because . stunk like that, that your mother was abusing the child?
A At the time I was just a child myself. I don't know what Daddy knew at the time that I was a child.
Q Okay. Well --
A All I knew is I was afraid to say anything myself.
Q Could it be, Mrs. Ross, that Johnny was a real bad behavioral problem?
A No.
Q That's not true?
A No.
Q How do you know that?
A Because Johnny was loving and affectionate and he liked to be around people and he liked to be treated just like every other child would.
Q You got a good memory of that, but, you couldn't remember the other side of it?
A Well, mainly because the others were the bad things, were more numerous, and they were wrapped more around my child-life than ten years ago. Alot

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of things I try to forget.

Q In other words, you remember more now than you did ten years ago, or you remember less now?

A I remember more ten years ago than I would now. I was afraid to say a lot then.

Q You sure didn't testify this way ten years ago, though, did you?

A I didn't testify against him.

Q You didn't?

A It was clear that my mother did abuse him.

Q You and your mother both testified for him, didn't you?

A I don't know how she testified. I didn't hear her testimony.

Q She didn't know how you testified either, did she?

A Not that I know of.

Q You are telling this Court that you went into that Courtroom and committed perjury, in effect, because you were afraid of your mother?

A No, at that time I told what I felt. I just withheld some things.

Q If you said that he was violent then, then, your memory was better then than it is now, is that what you just got through saying?

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A No.

Q That's not it?

A Not it.

Q How many times have you visited him in prison in the last ten years?

A I have been out of the State of Texas for seven to eight years, and I went to see him a couple of times before I did get married and leave Texas.

Q What, ten years ago?

A Yes.

Q And, since then, how many times have you been to see him?

A I haven't seen him until today.

Q You haven't seen him?

A No. I have talked to him on the phone a couple of times, but, I have not seen him.

Q Was his room fairly bare asfaras furniture and things of that nature?

A Well, at one time, it was a bed and a chester drawers in there and eventually there was just a bed and then, there was, I can just remember the frame of the bed, and then, I can remember just a mattress being in there and then, I can remember a time when there was nothing in there.

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Q Why did they keep stuff out of his bedroom?
A I don't know. It was just -- it was like it was Mama didn't want Johnny to have anything.
Q Okay. Let me see if this refreshes your memory ten years ago. You probably had a better memory then than you do now. "Question: Was there any reason that she kept things out of there?" Talking about the room, and your answer was, "Yes. What was that reason? Answer: So, he wouldn't hurt himself."
A That was the reason that we were given when we were children.
Q Okay. Okay.
A But, older, I can understand that, that wasn't really the reason.
Q Well, you were twenty-six years old when you gave that testimony under oath, were you not?
A Yes.
Q You were older then, weren't you?
A Yes.
Q And, you were under oath to tell the truth, weren't you?
A Also, I was reluctant because of my mother being there. I did tell the truth, but, I didn't tell the surrounding, the reason why.

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Q Well, is it true that the reason that the room was kept bare was so that he wouldn't hurt himself?
A That was what reason that we were given as children.
Q Is that true as a twenty-six year old woman, did you believe that was the truth when you testified under oath to that?
A No, Sir.
Q Okay. So, you then, lie, then, under oath?
A No, I didn't, lie.
Q Okay.
A I just didn't give the surroundings of the statement.
Q Were you living with your father in 1979, when this Defendant came back home, after he had been living with your aunt and uncle and they couldn't control him?
A Yes.
Q Okay. You were living there, and I think, he stayed there about nine days before he was arrested for this murder, is that about right, nine or ten days?
A I don't recall how long it was.
Q How long had he been out of prison on that rape charge before he was arrested on this case?

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A It was a short time. I can't remember how long.
Q A couple of months, something like that?
A Something like that.
Q You are two years older than the Defendant?
A Yes.
Q Did you know that your parents, your mother included, took him to the University of Texas Medical Branch in Galveston for testing when he was about eight or nine years old?
A I remember that they were getting him prepared to go to a state school to get help, but, I don't -- I don't remember when he went. I just remember him going there at one point in his life.
Q Lets back up. Do you remember when he went to the first grade?
A I wouldn't remember when he was in the first grade.
Q You would have been, what, the third grade?
A Third, yeah.
Q He failed the first grade the first year, did he not?
A Yes. Actually, he wasn't really in school that much, though.
Q Do you recall that the problem that he was having

at school was behavioral problems?
A Yes.
Q And, then, they suggested that he be put in a special education school, did they not?
A Well, I remember him being put into one, and I don't remember why, or exactly when.
Q Okay. Your mother and father were doing that, were they not?
A Yes.
Q Okay. All of this abuse going on during this time?
A Yes.
Q Okay. When he was going to school and going to the special education school, when, he was in the first grade?
A Yes. A lot of times he wasn't -- I remember Mama took him to Dickinson to a special school, I believe, and a lot of times she didn't take him.
Q What about the first grade?
A Alot of times she didn't send him to school, either.
Q If the records indicate it was because he was a behavioral problem, is that consistent with your memory?

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A That is, I remember, yes, it had to do with some behavioral problems, but, nothing to do with mental problems or anything like that, just he was an emotionally disturbed child.

Q Okay. But, he wasn't emotionally . sturbed around the house, he was abused at home, but, he was at school, he was emotionally disturbed?

A If you were abused, you would probably be emotionally disturbed, and other people, too.

Q What I am saying, you say at home, that he was a loving, tender child, never did anything of that type?

A As long as my mother when she was gone, we would sneak him out of the room, and yes, he tried, he tried to be -- to play with us and stuff, and enjoy himself, but, yes, he still had problems. He would scared wondering if my mother was coming, and he was scared, frightened.

Q But, he wasn't mean?

A No.

Q So, if you testified to that ten years ago, what is your explanation now?

A I don't believe I testified to him being mean, when we were children or anything like that,

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or in the sense, that he was intentionally mean.

Q What about his violence towards Jesse and others?

A He wasn't trying to hurt Jesse, h. would be -- they would both be trying to occupy themselves they had no toys there, they had nothing there.

BY MR. PRICE:

May I approach the witness, Your Honor?

BY THE COURT:

Yes, Sir.

Q I want to show you your testimony, Ms. Penry, just so that you won't think that I am inventing this some way or another.

BY MR. SMITH:

What page?

BY MR. PRICE:

Page 454, cross examination, about the third question, fourth question.

Q I ask you, and you read along with me here, "Ms. Penry, isn't it a fact that Johnny Penry was mean towards his younger brother, Jesse, is that correct?"

And, what was your answer?

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A "Yes."
Q Okay. Is that your answer today?
A Yes.
Q Was he mean towards Jesse?
A He wasn't mean intentionally towar. his younger brother. I did not surround that answer with another comment. I didn't specify the happenings of what things went on, what happened, I just merely answered the questions.
Q And, the next question,"Did this, go on for several years?" And, your answer was,
A "Yes, Sir."
Q Okay.
A But, I was probably thinking about the whole thing that was going on with my younger brother, not just that, but, the thing with my mother, and everything surrounding it.
Q Then, the next question says, "He also had problems with other children in his own peer groups or his own age, didn't he?" And, what was your answer?
A "Yes," but I didn't say it was because he was mean to them.
Q Well, I think, that was what we were talking about, wasn't it, being mean to Jesse?

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A That was not testified, was he mean to other children.
Q Okay. Okay. I want to direct your attention to Page 456, of the transcript.

"Question: There have been so medical records that Johnny's lawyers introduced some medical records here yesterday, and in those records there are some indications that there was a lot of violence conduct that he exhibited particularly towards other children and I am talking about over a period of several years, starting back in the first grade area.

BY MR. SMITH:

May I approach, Your Honor?

BY THE COURT:

Yes, Sir. What do you need?

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

Before the jury, reading a question from a document in evidence from a prior trial, which is not in evidence in that trial, being prejudicial and requests to strike it.

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BY MR. PRICE:

Proper cross examination. She has indicated that he wasn't mean or violent towards anybody, and in her prior testimony, just a one hundred eight degr[illegible]ifference.

BY MR. SMITH:

Those questions, I didn't object to that. That question, just recites that there were records that were in evidence, the trial record, but, no such records in evidence here, and I am going to oppose any records coming in here.

BY THE COURT:

Let me see the question.

BY MR. PRICE:

And, a couple of answers. This is a competency hearing, and incidently, this is not the capital murder trial.

BY THE COURT:

Objection is overruled.

BY MR. SMITH:

Just for the record, the objection is under the Fifth, Sixth, Eighth and Fourteenth Amendments to the constitution, corresponding with the Texas Constitution

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and Texas Code of Criminal Procedure.

BY THE COURT:

Still overruled.

Q I am going to direct your attention back to the question, Line 15, Page 456 of the [illegible]anscript.

"There have been some medical records that Johnny's lawyers have introduced, some medical records here yesterday, and in those records, there are some indications that were a lot of violent conduct that he exhibited, particularly, towards other children, and I am talking about over a period of several years, starting out back in the first grade area."

Was your answer, "Yes, Sir"?

A I wasn't answering yes, that he was being mean to the children. I was answering the question that are based on the medical records.

Q Okay. Next question. "But, of course, this information had to be related to the doctors by someone? Would you say that whoever gave that information was in error? Answer: Well, no, because he would get violent sometimes with us at home."

Is that your answer?

A I don't remember.

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Q Don't remember, oh, okay. I didn't misread is, though, did I?
A No.
Q You were still living at home when he went to Mexia State School, were you no?
A Yes.
Q Your parents got him into the Mexia State School, did they not?
A Yes.
Q They took him up there, did they not?
A As I remember it.
Q And, occasionally they would go visit him or get him and bring him home, on a furlough type thing?
A I don't ever remember them bringing him home, Don't remember moments of ever wanting to bring him home, and I remember going to visit him, and taking him out for maybe a couple of hours, I don't recall bringing him home. We could have but, I don't remember.
Q How many years was he in the Mexia State School?
A I don't remember that either.
Q Was it about three, be a ball-park figure?
A Perhaps, but, I don't remember.
Q You know about what age he was when he went in?

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A I don't remember, except maybe around twelve or something like that. I don't remember.
Q Did you ever go to the Mexia State School?
A Yes.
Q That is a school, too, is it not? It is not a hospital for the mentally ill or something?
A We were just explained that as children that it was just like a little community that he lived in. I really don't know what it was. I just know what Dad would tell us.
Q Did he ever tell you about any problems that he had up there at the school?
A I don't remember.
Q Do you recall testifying before that he told you that he didn't like it because he couldn't get along with the boys, with some of the boys up there?
A I remember him saying that he didn't like being there. I don't remember as to why at this date.
Q You also,recall that he also told you that he didn't like the teachers up there?
A I don't remember.
Q Okay. If you testified to that before, would that be accurate?

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A I don't even remember.
Q Let me show you your testimony from before and see if it refreshes your memory, a little bit.
BY MR. SMITH:
Can we have the page?
BY THE COURT:
What page, Mr. Price?
BY MR. PRICE:
Page 467. Start with Line 18.
Q "Did he ever talk to you about the Mexia State School? Answer: Once in awhile. Question: Did he like it? Answer: No. He talked about a lot of things that happened to him that weren't good and things like that. Question: What were some of the things that he would tell you about that? Answer: Well, he couldn't get along with the boys, there. He didn't like the teachers."
Is that your answers?
A Yes,
Q Is that pretty well the way that you remember it now?
A Yes.
Q Okay. Your father took him out of Mexia State School, did he not?

A Yes. I don't think my Dad ever really wanted him to be there. It was just to protect him.
Q Do you recall why your father took him out of the Mexia State School?
A Because he learned everything that wasn't proper.
Q Like homosexuality?
A Yes.
Q You think he learned it up there, is that what your father thought?
A That is what I was told. I don't know if that is what Johnny learned. I just know that is what Dad told me at the time when we were children.
Q And, when he took him out of the Mexia State School, your mother wasn't around at the time, was she?
A I can't remember. I remember he being there when we moved to Goodrich, and I remember my mom being there but I don't remember at what point in life.
Q Didn't they get a divorce shortly after that?
A My mother left.
Q And, didn't they --
A Shortly after we moved to Goodrich, my mother left.

Q And, they got a divorce sometime after that?
A Yes.
Q Did they get into a custody dispute also?
A Yes. It was a fight between the two of them.
Q Okay.
A For a period of time.
Q Do you recall when your brother may have gone to Austin State Hospital, and Rusk State Hospital on a commitment out of Harris County?
A I remember him being there, but, I don't remember why or when, or when he came home. I just remember that part in life.
Q He wasn't at home when he got committed to those -- to that hospital, was he?
A I don't remember.
Q Okay. Your memory is bad in that area?
A Well, I just -- I remember a lot of the incidents, but, sometimes, I don't remember before or after the incident.
Q You don't remember him getting into any kind of trouble in Houston, Texas?
A I don't remember.
Q Don't remember that?
A What happened, no.
Q When he was seventeen years old, how old would

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you have been?
A Nineteen.
Q And, you can't remember what happened when you were nineteen?
A No, I can't remember what happened that time.
Q Okay. But, you can remember what happened when you were four years old, when he got burned?
A Because I was scared.
Q And, all of those others?
A And, I was abused as a child, also, that is why I remember those things so well.
Q What effect has it had on you?
A Well, I, me, being abused, as a child?
Q Yes, ma'am.
A Well, it hasn't had a very good effect. It has made me want to do my children better than my mother did me.
Q Better or the same way?
A No, definitely not the same way.
Q Better?
A Yes, Sir.
Q And, you haven't gone out here and killed anyone, either, have you?
A No.
BY MR. PRICE:

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I pass the witness.

BY THE COURT:

Any other questions of this witness?

BY MR. SMITH:

Yes, Your Honor.

REDIRECT EXAMINATION

QUESTIONS BY MR. SMITH:

Q Mrs. Ross, is it hard for you to talk about all of these things that your mother did as a child?

A Very hard.

Q When Mr. Price read you a question talking about a medical record, you remember that?

A Yes.

Q And, the question said, information had to be related to the doctors by someone. Do you remember that?

A Yes.

Q Do you know who the someone was that gave the information to the doctor?

A No.

Q You don't know whether it was your mother?

A I don't remember. I don't know. I don't remember.

BY MR. SMITH:

Pass the witness.

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BY THE COURT:

Does the State have any other questions of this witness?

BY MR. PRICE:

Just a moment, Your Honor.

No further questions, Your Honor.

BY THE COURT:

Okay. You can step-down, Mrs. Ross. You are not to discuss your testimony with any other witnesses. You are under the rule, you understand?

BY MRS. ROSS:

Yes, Sir.

BY THE COURT:

Not to ask them what they said. At this time, we will recess for about fifteen minutes. You are still not to discuss the case among yourselves or with anyone else.

REPORTER'S NOTE: (WHEREUPON AT 10:30 A.M. A FIFTEEN MINUTE RECESS WAS HELD.)

(JURY IN AT 10:50 A.M.)

BY THE COURT:

Who is your next witness, Mr. Wright?

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BY MR. WRIGHT:

Jesse Penry.

BY THE COURT:

If you will raise your right hand and be sworn in.

REPORTER'S NOTE: (WHEREUPON THE WITNESS WAS DULY SWORN IN BY THE CLERK.)

BY THE COURT:

Just have a seat. Okay. Mr. Wright, you can proceed.

JESSE PENRY

called as a witness by the Defense, having first been duly sworn to tell the truth, testified on his oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. WRIGHT:

Q Would you state your full name for the record, please, Sir?

A Jesse DeWayne Penry.

Q Where do you live, Sir?

A 464 West Army, in Coolridge, Arizona.

Q How old a man are you?

A I am twenty-eight.

Q How are you employed?

A I am manager to a pizza place in Coolridge.

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Q Are you related to Johnny Paul Penry?

A Yes, I am.

Q And, how are you related to him?

A Brother.

Q Okay. Are you older or younger?

A Younger.

Q About how many years younger are you?

A I don't know exactly.

Q Alright. A few years?

A Yeah.

Q Did you grow up with Johnny?

A Yes, I did.

Q Is Johnny mentally retarded?

A Yes, he is.

Q How do you know?

A Just by trying to teach him to read and write. I have always known more on reading and writing than he did.

Q Okay. Was Johnny treated the same by his mother as you and the other siblings?

A We were both treated badly. But, Johnny was the worse.

Q Okay. Is it to believe that Johnny was really your father's child?

A No.

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Q Sir, for the purposes of the printed record, does Johnny look strikingly different from the rest of his siblings?
A Yes, Sir, he does.
Q Over all, Jesse, speaking of Johnny, was he mean and violent?
A No, he was not.
Q Did Johnny have any tendencies to take the blame for things other than his?
A Yes, he did.
Q Jesse, some years back, isn't it a fact that you did get a conviction for burglary?
A Yes, Sir.
Q Is that in Granberry?
A Yes, it was.
Q Here in Texas?
A Yes.
Q Did you get a probation?
A Yes.
Q Did you successfully serve out your probation?
A Yes.

BY MR. WRIGHT:

Pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Is that burglary of a building or burglary of a habitation?
A Burglary of a habitation.
Q And, how many years probation did you get?
A Five years.
Q When was that?
A About ten or twelve years ago.
Q You live down the probation, okay?
A Yes, Sir.
Q No problems?
A No.
Q Were you with your sister?
A Yes, I was.
Q When that was committed?
A Yes, Sir.
Q Okay. That is the same offense, or both together?
A Yes.
Q You got no other convictions, I take it?
A No.
Q Okay. And, certainly no violent crimes or whatever in your past?
A No.
Q How old were you when this Defendant went to the Mexia State School, if you recall? Or do you remember much about that?

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A I don't know when Johnny left and came back, I know when he was there, but, then, disappeared and I don't -- I don't really remember how it came in like that.

Q Do you remember when he came back , 'er he got out of Mexia State School?

A I remember, yes, in Goodrich.

Q Okay. And, he lived there with you and your father for awhile?

A Yes, all of the girls and us two boys lived in Goodrich.

Q And, were you also, living with one of your aunts?

A My aunt was living with us, well, --

Q The other way around?

A What I am saying, staying at one of my aunt's houses.

Q What aunt was that?

A Evelyn.

Q What is her last name?

A Young.

Q Was she the one that was living with you?

A No, she was living beside us. She had her house and, well, this was her house that we were staying in, too.

Q That was after he got out of Mexia?

A Yes.

Q Okay. And, how long did he live there with you and your father and sisters after he got out of Mexia?

A I don't know. I was being pulled between the two parents, so, --

Q You go to your mother's some?

A Right.

Q They were having a custody dispute between them over the divorce, is that fair to say?

A Yes.

Q Were you around when he went to Austin State Hospital on a commitment out of Harris County?

A I was gone. No, I don't remember that. I mean, I remember it, but, I don't. I wasn't around.

Q Okay. You do know that he did go to the Austin State Hospital?

A Yes.

Q Transferred there to Rusk?

A Yes.

Q Were you gone from home, the entire time he was in those two hospitals?

A Yes.

Q It was about a four or five month period, I

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guess, is all that it amounted to, but, you were not home at that time?

A Right.

Q Do you know why he went to the hospital?

A Just bits and pieces. I never did hear the whole story of it.

Q What are the bits and pieces that you remember?

BY MR. SMITH:

Objection, speaking hearsay.

BY MR. PRICE:

I didn't understand the objection.

BY MR. SMITH:

Hearsay.

BY THE COURT:

Sustain the objection.

Q Did you know that he had left home before he wound up in the Austin State Hospital?

A No.

Q You didn't know that he had lived in Lufkin, for a while, worked at a restaurant there in Lufkin?

A No, not at the time. I was in Ohio.

Q Okay. Is that where your mother was at that time?

A Yes.

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Q When did your mom pass away?

A Eleven or twelve years ago. I think it was in 1980, December, or right before Christmas.

Q How old were you -- well, you are six years younger than, or approximately six years younger than Mr. Penry is?

A I am twenty-eight, Yes, Sir.

Q Somewhere in that area. You don't, I guess you don't remember much about his early childhood then, do you?

A Well, I remember bits and pieces of, you know, the little things, that a kid will remember.

Q How old were you when you have your first recollection?

A I don't know how old I was,

Q Two or three years old?

A I don't know how old I was.

Q Okay. Do you remember him going over to Mexia State School?

A No, I don't. I remember going to visit him.

Q Okay. With your parents?

A Right.

Q That includes your mother?

A Yes.

Q Are you married?

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A Yes, I am.
Q Do you have children?
A I have a step-daughter.
Q Are you employed?
A Yes, Sir, I am.
Q Who are you employed by?
A Ricardo's Pizza.
Q In your recollection, your earliest recollection of this Defendant, do you recall him being violent?
A No, I don't.
Q Do you recall an instance where he took a sharp object and peeled the skin off the bottom of your feet?
A Yes, I do. If he ever went -- he did this, but it wasn't as if he ever made me cry or anything. He would always pat me and say he didn't mean to.
Q He did hurt you some?
A I can only remember one or two instances, yes.
Q You were a very young child at that time, weren't you?
A Yes, I was.
Q But, it sticks out in your mind, though?
A Yes.

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BY MR. PRICE:
I have no further questions.
BY THE COURT:
Any other questions?
BY MR. WRIGHT:
Nothing further, Your Honor.
BY THE COURT:
Okay. You can step-down. You are not to discuss your testimony with any other witness.
Who is your next witness?
BY MRS. LIEB:
Lucille Anderson.
BY THE COURT:
Lucille Anderson.
REPORTER'S NOTE: (WHEREUPON THE WITNESS WAS DULY SWORN IN BY THE CLERK.)
BY THE COURT:
Just have a seat and if you would, when you sit down would you move that mic around where you can speak into it so everyone on the jury can hear. Alright.

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LUCILLE ANDERSON

called as a witness by the Defense, having first been duly sworn to tell the truth, testified on her oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MRS. LIEB:

Q Please state your name?

A Lucille Anderson.

Q And, what town do you live?

A Willis, Texas.

Q Are you related to Johnny?

A I am Johnny's aunt.

Q And, that is on his father's side, is that right?

A Yes.

Q Do you remember your brother's first wife, Shirley?

A Yes, I remember Shirley.

Q She is Johnny's mother, is that right?

A Right, uh-huh.

Q How old was she when she married your brother?

A About sixteen.

Q Can you describe her personality at that time?

A Well, at the time, she was very unhappy because her mother had passed away.

Q When was the first time you saw Johnny?

A The first time I saw Johnny was when he was brought to me from Laughton,Oklahoma, as an infant baby, three weeks old, his mother was in the hospital, had to be put in a mental hospital at the time.

Q And, you saw him when he was three weeks old?

A Yes.

Q And, who brought him to you?

A My brother and some of his friends from Laughton, brought the children to me because the mother had to be put in the hospital.

Q You were living in Texas at the time?

A Yes, in Houston.

Q Did you take care of the child?

A Yes, for eight months.

Q Okay. Can you describe him physically as a child?

A Beautiful. They brought him to me in a bassinet beautiful little baby boy.

Q Did there come a time when your brother and Shirley returned from Oklahoma?

A Yes. After they released her from the hospital, mental hospital in Laughton, they came to home to take the responsibility of their little children.

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Q And, you were taking care of another child, also?
A Trudy and Johnny.
Q And, did they live with you?
A Yes, for about two months, until they could get on their own.
Q When Shirley returned, did she take-over the responsibility for Johnny?
A She tried, but, it was very hard because the children were looking to me, I was like mama, and it was hard for her, but, she tried.
Q Did you see Shirley show Johnny affection?
A At times she was affectionate, not any long period of time, she would kiss them and love them.
Q Did you ever hear Shirley call Johnny any names?
A Yes.
Q What would she call him?
A The Little Nut, the Little Spoil Brat, the Little Bastard.
Q Was there a meaning behind the name, Little Bastard?
A The only meaning that I could put behind that, is that she said, that is my brother, she come home with us, pregnancy, two months pregnant

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with Little Johnny, and she knew I knew it.
Q You knew that?
A So that would be behind the words, I suppose, that she would use, and there was jealousy because there was affection towards [illegible] like mama, and I could see, you know, why she would feel that way, because it was very hard to turn to the real mama.
Q Did you ever see Shirley slap Johnny when he was a little baby?
A Yes. Not just a slap, she would sock him when he would be sitting in the high chair eating, right in the mouth.
Q See that on more than one occasion?
A I just saw it that one time, and I don't know how many more times it could have happened.
Q How old was he when she socked him in the mouth?
A She had been in our place about two months, after they came home from Laughton, and it was sometimes between those two months that they had to stay with us, until they could get on their own.
Q So, you saw Shirley sock him when he was about ten months old?
A Just a little baby in a high chair.

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Q You were eating at the time?
A Yes.
Q What happened to the food in his mouth?
A If you have a mouth full in your mouth, you are going to spit it out if you are sl: ed in the mouth.
Q You know what triggered the slap?
A She didn't like the way he was chewing it, or eating. I guess it was kind of, you know, little babies, takes time to learn.
Q Did you see a disciplinary slap, or something worse?
A I can only talk about what I saw.
Q Right. But, was that a normal disciplinary type thing?
A Not towards a little baby, no.
Q It was rougher than that?
A Yes.
Q Did you say something to Shirley when you saw that?
A Well, since we already knew, that I knew that Little Johnny -- she was pregnant with him when she came home and my brother forgave her and took him in, gave him his name and to be his father, he tried to be a good father, but,

she knew I knew that he was not my brother's son.
Q Okay. Did you say something to her?
A I told her, I said, that he couldn't pay for what she done wrong, that was her doing, ot him, and he wasn't to blame.
Q Meaning that Johnny wasn't to blame?
A Little Johnny was not to blame for the way that he was brought into this wicked system.
Q What did Shirley say to you?
A She didn't say anything, she just looked at me.
Q And, you said that the family moved out when Johnny was about ten months old or so?
A Something like that.
Q Sometime thereafter, did you see Johnny with a broken arm?
A Well, sometime within that first year, I saw his arm in a cast. I did not see the accident, I asked about it, the answer that I got, was that --

BY MR. PRICE:

Objection, Your Honor, to hearsay.

BY THE COURT:

Okay. Don't tell us what someone else told you.

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Q But, you didn't see what happened?
A No, I didn't see it.
Q But, you saw his arm?
A I saw his arm in a cast, right.
Q Was there a time later on when Shirley left one or more of her children with you again?
A Well, she left my brother again some time later, this was after they were situated in their own little home, she left again and was gone for quite some time, I do not remember how long, and she took only Trudy with her and not Johnny, and left Johnny and then, later Trudy was dropped off at my house with impetigo and I, as soon as I got her well, over the impetigo, she came back to get Trudy.
Q Did she want to get Johnny also?
A No, she didn't mention Johnny.
Q Was there a time ever that Shirley physically attacked you?
A Yeah, this one time when she came back just to get Trudy, after I had gotten her well over the impetigo, yes, she attacked me and was accusing me of stealing her children's affection. I knew that she was not well, I knew that she was mentally ill, by the way she acted, but,

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I did have to ward off some blows.
Q She actually, --
A She actually attacked me.
Q Did the police come?
A My son had called the police because he was afraid for his mother, naturally, yes. The police came and they had her to leave because she was disturbing the peace, and a man was parked down the road a little ways in a truck, waiting for her and she left with him.
Q And, after Johnny was no more than a little baby, you physically lost touch with him, didn't see him too much?
A I would see him occasionally at family reunions.

BY MRS. HILL:

I pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Mrs. Anderson, I believe back when Johnny was seventeen years old, did he run away from home?
A I heard that he had, but, I don't know that he had.
Q You don't? You do know that he got arrested in Houston, don't you?

BY MR. SMITH:

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APPENDIX G

EXCERPT FROM CROSS-EXAMINATION

OF DR. PRICE

objection, and Ninety-Seven is admitted -- it was admitted yesterday, and it is admitted again, we the right that you will have the right to look at it over your objection.

BY MR. SMITH:

Alright.

(END OF CONVERSATION HELD AT THE BENCH.)

A And, it was actually from Dr. Pebbles, also, MHMR.

Q I think they are in. Can I see your MHMR records?

A (Witness Handing).

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBERS ONE HUNDRED ONE AND ONE HUNDRED ONE (A) WERE MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q Dr. Price, I am going to show you first of all what has been marked as State's Exhibit Number 101 (A), and ask you are those the documents from MHMR that you relied upon?

A Yes, they are.

Q Now, I want to show you State's Exhibit Number 101, and I am going to direct your attention to a couple of documents in there that I marked already about half way through, The first

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document there, does that appear to be the same document that is a letter from Dr. Pebbles, that is part of State's Exhibit Number 101 (A)?

A Yes, it appears to be.

Q And, if you would, the next documer does that appear to be the same document in 101 (A) which is a document signed by Mary Cochran, psychologist?

A Yes, it is.

BY MR. PRICE:

Your Honor, we would offer into evidence, State's Exhibits 101, the Defendant's records from Texas Department of Mental Health and Retardation in Polk County, and State's Exhibit Number 101 (A) which is the document which the witness relied upon.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. PRICE:

Judge, for the purposes of the record, for all of these exhibits, on the Punishment Phase Exhibits, we would agree for Counsel to make objections out of the presence of the jury.

BY MR. SMITH:

As to 101 (A), Judge, we object on the grounds of insufficient, we usually go earlier, and also, the Fifth Amendment etc.

BY THE COURT:

State's Exhibit 101 (A) is admitted over the Defendant's objection, and 101 is admitted over the objection, subject to making further inspection of it.

BY MR. PRICE:

Yes, Sir. For the purposes of the record, I might add that State's Exhibit 101 has previously been introduced in these proceedings under Defendant's Exhibit Number Four.

(END OF CONVERSATION HELD AT THE BENCH.)

Q Do you have any Texas Rehabilitation?

A Yeah. (Handing).

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBERS 102 and 102 (A) WERE MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q Dr. Price, I will show you what has been marked as State's Exhibit 102 (A) and ask you if that

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APPENDIX H

EXCERPT FROM THE REDIRECT EXAMINATION

OF DR. PRICE

would love for him to take them back to Dallas.

BY THE COURT:

He has enough records, let's proceed.

Q Now, in 1965, try to do this so everyone can see, try to write legibly, which I very rarely do.

In 1965, there was a verbal and a performance and an overall score, right?

A Yes, that's correct.

Q Okay. I am going to write up here, "V" for verbal, and "P" for performance, okay? Can you read my writing?

A Yes, Sir.

Q Does my "P" show signs of brain damage?

A It might.

Q Thank you.

BY MR. PRICE:

At least impairment.

Q What was his verbal score in 1965?

A 72.

Q Okay. And, what was his performance score in 1965?

A 47.

Q And, what was the full scale score in 1965?

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A 56.
Q And, that is consistent or inconsistent with your conclusion that Johnny Perry is mentally retarded?
A Consistent.
Q Okay. What is the next IQ score that you are aware of?
A 1968.
Q 1968? We have got a twelve year old now, correct?
A Yes, that's correct.
Q And, we have a verbal there?
A Yes, 55.
Q 55. What is the performance score?
A It is also 55.
Q And, what is the full scale?
A It is 51.
Q And, someday, not now, because it would take too long, to explain to me how a professional averages 55 and 55 and gets 51?
A It is not an average, it is a different set of forms for the full scale IQ.
Q Okay. But, that happens?
A I have seen that happen before.
Q Does that happen sometime? And, what is that consistent or inconsistent?
A That is consistent.

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Q With your view that he is mentally retarded?
A It is consistent.
Q Okay. What is the next time, asfaras you know, that anyone ever gave him an IQ test or give him any kind of a IQ score?
A 1973.
Q Well, before you get to '73, let me show you Defendant's Exhibit Seven already in evidence, a copy which is dated June 10, 1971. Have you seen that before?
A Yes, I have.
Q And, what is that?
A This is an educational prescription that I believe was from the school.
Q Does that say anything about his IQ in 1971?
A Yes, it says that the results were generally in line with his measured IQ of 51, which they actually obtained from doing a chronological age, comparing his mental age, and as a result with have a general IQ score there of 51.
Q So, they did some kind of a process that they said was consistent with the 51 IQ?
A That's correct, yes.
Q They didn't do a separate IQ test, but, they took a look and looked back and said it looks

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consistent with the 51 score in 1968?
A Yes, that's correct.
Q Okay. Tell me again where the cut-off for mental retardation according to the standard case?
A It is 70, is the cut-off.
Q Now, will you tell me about this 1973? In 1973, there are a few different documents there.
A Yes, these were -- it was the first set that came from the school system, the Goose Creek Independent School District.
Q Okay. Documents there dated January 23, '73?
A January 23, of '73, overall IQ was less than 50.
Q Okay. Gave him some kind of a test in Goose Creek, then, in January of '73, came out less than 50, right?
BY MR. PRICE:
Could I see that document, please?
BY MR. SMITH:
That is Defendant's Exhibit Number Three in evidence.
BY MR, PRICE:
Could I see it?
Q If it had showed something less than 50, --

A Less than 50.
Q Get the idea?
A Yes, Sir.
Q And, then, you have an IQ of some kind of IQ test in September of '73?
A Yes, Sir, the Austin State Hospital.
Q At Austin?
A Yeah. They did a short form of the IQ test and said that the IQ was approximately 50.
Q Okay. About 50. And, then, in October of '73, did they do another one?
A Yes, that was at Rusk State Hospital.
Q Okay. That they gave a verbal and performance in a full scale, right?
A Yes, that's correct.
Q What was the verbal?
A The verbal was 50 -- 69.
Q 69. What was the performance?
A 74.
Q And, what was the full scale?
A 69.
Q And, was that consistent or inconsistent with mental retardation?
A That is consistent.
Q Okay. Now, in November of 1976, did somebody

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test him again?

A Yes, that was MHMR in Deep East Texas.

Q And, what score did they get there?

A They gave a Stanford-Binet, which is the other major IQ test, and came out with an Q of 43.

Q They said that was 43, and they said that was low?

A They said that they felt that was another estimate of intellectual ability..

BY MR. PRICE:

Where is that document? Where did you get that document from?

A Also, that one goes back to -- I don't know the Exhibit Number, on the MHMR.

BY MR. SMITH:

You may put it in, probably. Alright, under estimate next to the 43.

BY MR. PRICE:

Specifically it says, "This appears to be an under estimation of his ability."

BY THE WITNESS:

Mr. Smith, let me write under estimation or under estimate.

BY MR. PRICE:

Doesn't matter.

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Q Okay. Okay. And, is that consistent or inconsistent with mental retardation?

A It is consistent with mental retardation.

Q Even if 43, is an under estimate he is still retarded, is that correct?

A Yes, that would be correct.

Q Then, was he given a test in 1978? I forgot to write down 1976, year here.

1978, did they give him a test?

A The next one I have is 1979, I think from the TRC, that is what I have on here.

Q What is the exact date?

A 9/18/79.

Q Okay. That is a typo here in 1979. What was the verbal score in 1979?

A 56.

Q 56. What was the performance score?

A 72.

Q 72. What was the full scale?

A 61.

Q Okay. And, you did a test in 1990, right?

A Yes, that's correct.

Q What were your results?

A The verbal is 63.

Q Okay.

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A Performance 66, full scale is 63.

Q This man ever in his life, asfaras you know, have an IQ test that didn't show him to be retarded?

A No.

Q Okay. Dr. Price, one more time. W. t was the purpose for which you examined Johnny Paul Penry?

A To determine if there was a presence of mental retardation and/or organic brain damage, and if so, to what extent.

Q And, tell us one more time, what you found?

A Found that he has organic brain damage, and as a result, brain impairment, which because it started so early in childhood, this diagnosis of retardation.

Q And, Mr. Price, showed you a lot of documents that he asked you whether you had seen and you said you hadn't, seen them. Now that he has shown them to you, is there anything from the test, any doubt whatsoever on your conclusion?

A No, there is not.

BY MR. SMITH:

Pass the witness.

RECROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q When did you look at the documents?

BP-AE-13 PENDAFLEX, MUNCIE, IN 47305

APPENDIX I

EXCERPT FROM THE DIRECT EXAMINATION OF

DR. SAMENOW

Q Whether you want to use those adaptive skills for good or evil?
A There is a choice.
Q Did you notice various diagnoses of this Defendant throughout his mental he :h history?
A Many.
Q Okay. Does that strike you as kind of unusual Doctor?
A No, not really, because he was a very, very puzzling person to the people that confronted him over the years, and so, really, the diagnoses ran --. I won't say that everything that he was termed, that you could term somebody, but, boy there was a long list. Brain damage, psychosis, adjustment reaction, of course, the mental retardation, anti-social personality, and there are many -- of such an individual, and people saw different -- at different times, and they were certainly puzzled by what they saw, and I think that has an awful lot to do with the variance of diagnoses.
Q Why do you feel like that there was such a variance there?
A Because I think this man has been involved in many, many different ways, depending upon what

his objective is. There were numerous citations in the record, both I believe in the medical records and the disciplinary records, that if he was angry and if he wanted to lessen the severity of punishment for an infra ion, he might threaten to kill himself, so, therefore, he would appear to be verbal. There were times when he appeared to be very non-verbal and not to understand very much. So, this was attributed to retardation.

The adjustment reaction, well, there were times when he was able to behave pretty well, he would get paroled to the rape conviction, the records reflect that he did well then, so, perhaps it was adjustment reaction. So, again, people saw slices of behavior and based on what they saw, they might make a diagnosis, and others say the psychiatrist, indicate that there are some observations that he heard voices, and they were auditory, and I believe, visual hallucinations Well, there was one doctor that had, I think it was Dr. Pebbles, I have to check my notes, who conjectured that he may well have picked this up at Austin, at the state hospital, and so, there was some question about malingering in terms of

psychosis, in other words.

BY MR. SMITH:

Renew, for the record, Estelle v. Smith objection and move to strike the testimony from the record.

BY THE COURT:

Objection is overruled.

BY MR. SMITH:

And, a Motion for Mistrial.

BY THE COURT:

Motion for Mistrial is denied.

Q Go ahead, Doctor.

A It was Dr. Pebbles, who stated, and this was on the 19th of May, 1979, he, in reference to Mr. Penry, relates that he has on occasion, heard voices and saw things, but, he is very vague, and I, Dr. Pebbles, talking people, that he probably learned this at Rusk State Hospital and is using this as an excuse to cover up his offenses.

Q I think that maybe at the date that you said, May of 1979, I believe it should be May of '77, Doctor.

A I may have typed the wrong date in my notes here, I don't know.

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Q When he was examined by the Polk County MHMR?

A Yes, it is in the Polk County Folder.

Q Okay. Was that on the first rape case with Diana Koch examination?

A Yes.

Q Okay. What again did Dr. Pebbles say there that he may have learned that?

A At Rusk State Hospital, as an excuse to cover up his offenses.

Q Did you see instances where he would use maybe mental retardation as an excuse?

A Yes. There was several observations made by his using, or at least a conjecture that he was using the mental retardation and again, the TDC Medical Records, Volume One.

BY MR. SMITH:

Same objection, same motion, Your Honor.

BY THE COURT:

Objection is overruled.

A This was, if my memory serves me correctly, it had to do with a breaking of a sink in his cell, and Mr. Penry felt he should not have to pay because he is retarded, and in a discussion at that time, he brought up, this is a quote, "If

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I was working, they may think I am not retarded, anymore."

In other words, he thought that the fact that he was working in a work capable program, might suggest that perhaps he wasn retarded.

Q And, just generally speaking, were there examples of where he would use his mental retardation as an excuse?

A Yes.

Q Okay. Was he, or has he been diagnosed as having anti-social personality on several occasions?

A Yes.

Q Do you concur with that diagnosis, Doctor?

A Yes.

Q Would you kind of tell the jury about what an anti-social personality is?

A Well, the term anti-social personality cannot be applied to an individual unless he is eighteen or over, but, the onset occurs before the age of fifteen, and there is a list, I have the DSM3.

Q You don't have to go through it, unless you want to.

A Alright. Let me just say this. In my review of the records, there was a series of expanding and intensifying anti-social acts, virtually in

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every category; sexual misconduct, fire, fight, theft, runaways, and this again, very,very clearly in life, I think there was something in the records about a three-year old brother, but in any event, everyone has problems wi this human, whether at home, or the attempt at school in these institutions in which he was in, because he would not live within the norms and standards or guidelines of those institutions, except again, like I said earlier, when it served his purpose, and as it obviously did in terms of earning a parole.

Q Did you note from his records a broad range of criminal behavior as you just mentioned?

A Yes. In virtually every area, sex, property, assaultive, references to substance abuse, although, there was not a major pattern, but, it was there, and a lot of violence.

Q What significants do you attach to the fact of that broad range of criminal activity?

A Well, that this -- that Mr. Penry was a person who really,simply made a series of choices over time not to live within the, as I said earlier, the norm and standards of society, that he had a mind of his own, that he wanted to establish

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himself in this world, in his way, to exert power over people, or control people that he could control, that he was able to shut off concerns of right and wrong, long enough to do what he wanted to do, and did so with very, very little remorse, if at all, and that is a person who, in a sense, was the law within himself.

Q Is that consistent with anti-social personality?

A Yes.

Q Okay. Is that type of conduct or behavior necessarily consistent with mental retardation?

A Is it consistent with mental retardation?

Q Right.

A I would say, if anything, it is probably pretty inconsistent.

Q Inconsistent, but, it would be consistent with an anti-social personality?

A Yes.

Q In reviewing those records and his prior criminal and violent behavior, did you note where that may have involved any premeditation or planning, outside of the incidents that you have already mentioned about the murder at hand as well as to the rape of Diana Koch?

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A Well, I think some of the things that I referred to earlier, the fact, that is, Mr. Penry was able to kind of capitalize on the appearance of being retarded, or he would threaten, there was a threat to act crazy. This was a person w. did what he wanted to when he wanted to do it.

Q And, did you see specifically in his records where he had threatened to act crazy or act mentally retarded?

A Yes. This is from the TDC Medical Records.

BY MR. SMITH:

Can we have a continuing objection to everything out of the TDC records, Your Honor?

BY THE COURT:

Alright. The objection is overruled. You can answer the question.

A On Page 296, there is a quote by the staff, "He stated that he might start acting crazy if he didn't get a cell change."

Q Okay. Based on your review of those records, in your opinion, can he exercise self-control when he wants to?

A He can and he did.

Q What about acting deliberately?

BP-AE-18 PENGAD/INDY, MUNCIE, IN 47308

A He did, and he can.
Q In your opinion, Doctor, based on those records and what you have seen of this man, would you describe him as an aggressive or a passive individual?
A Aggressive.
Q Would you describe him as violent?
A Very.
Q Is he capable of acting voluntarily?
A Yes, he is.
Q These choices to engage in criminal activity, the criminal activities that you have seen, is that based upon his free will or is he just impulsive and can't control himself?
A Well, really, no indication that he is not able to control himself, that is, this is inside, he was able to control himself and there were periods where he was relatively well-behaved.
Q Based on the records that you reviewed, would you say that he is a manipulative individual?
A Yes.
Q Have you seen any indication that he showed any remorse?
A No.
Q Is he a loud criminal?

A Yes.
Q Does he have a criminal personality, as you described previously, in your writings?
A In the extreme sense.
Q Is he dangerous in your opinion?
A Yes.
Q Is he likely to change?
A Well, you know, I think that is -- it is a fair question, and I have asked questions about a person changing, and the answer is this. Who knows. That would be -- have to use past records as the best indicator, and also, one other thing, you did ask me whether he had expressed remorse and I said know, and there was also, nothing that I read in this whole pile here, nothing that I recall, anyway, saying that he really felt that this way of life was no good and for any of us to change anything about ourself, I don't know if the way it looks with cigarette smoking, much less a whole way of life, you have to reach a rock bottom and you have to be fed up with yourself, not the situation and I would say the prognosis would be pretty bleak.
Q Has his criminal behavior declined or escalated

as he has gotten older over the years?

A It has expanded and intensified.

Q Has it become more violent?

A Yes.

Q And, has it continued to be violent and assaultive even with him confined in a maximum security?

A Very much so, even in prison.

Q Okay.

BY MR. PRICE:

I pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. SMITH:

Q Who is Gregory Mark Campbell, Doctor?

A I beg your pardon?

Q Who is Gregory Mark Campbell?

A I don't know.

Q Was he a patient of yours?

A Gregory Mark?

Q Campbell. Is he a patient of yours?

A I cannot reveal who my patients are.

Q Was he a drug dealer?

A I cannot make any comment.

Q Well, it is a matter of public record that you submitted a report for him, isn't it?

A I don't know if that is a matter of public record.

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APPENDIX J

EXCERPT FROM THE STATE'S CLOSING ARGUMENT

in that area, Diana Rearden could go out here and commit anything that she wanted to now, you know, I have been raped, so I can go do what I want to do. Nobody, no evidence, none of all that there is a causal connection.

I mentioned to you, this is society's part of the trial. I am going to get down to the heart, and then, sit down and shut up.

This has been a long, long ordeal for a lot of people. Long ordeal. I told you in opening argument this began on October 25th, to bring this man to justice. Pamela Carpenter started this battle to bring in to justice when she gave that description and when she put those two puncture holes in his back. She started that battle to bring him before the bar of justice. It is here now, and it is fixing to be handed to you and you do carry a very, very high responsibility and a very serious obligation. You have an obligation to protect society from the likes of Johnny Paul Penry, and you have an obligation to be sure that the punishment fits the crime, and you know how horrible the crime is and if there is anybody in this room that believes in the death penalty, we know that it is Johnny Paul Penry, because he inflicted it, without giving Pam Carpenter the right to a judge, jury, a lawyer. She didn't get her rights read to her, she got a pair of orange handled scissors buried deep in her chest.

The best example that I can give you of responsibility, and I am going to set down, your responsibilites in this case, in the facts of the case, and one thing that just kind of is back in the background there, and I want to point this out to you because it comes right back to your responsibility, and your decision in this case. In 1977, this man raped Diana Rearden. A few months later he was examined by Dr. Felix Pebbles, who found that he was sane. He knew the difference between right and wrong, and he was competent to stand trial, but, Dr. Pebbles, went on

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and made an additional finding that was really out of the ordinary, and I have never seen this in any kind of a report, he just added it, he said that it is my further professional opinion, that if Johnny Paul Penry were released from custody, that he would be dangerous to other persons. That was written on May 19, 1977. Two years later, and in August of 1979, Johnny Paul Penry was released from custody on parole, less than sixty days later, he murdered and raped Pam Carpenter. You have a responsibility to see that, that never occurs again. The horror that is Johnny Paul Penry is, etched in face, in the sole of Diana Rearden and it is etched in the blood of Pam Carpenter. It must end here and that is your duty and responsibility. Thank you very much.

BY THE COURT:

Ladies and gentlemen of the jury, again, you are reminded that you are not to consider the argument of either of the attorneys as any evidence. At this time, you will retire into the jury room and

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APPENDIX K

REPORT OF DR. PEEBLES

DEEP EAST TEXAS REGIONAL
MENTAL HEALTH MENTAL RETARDATION SERVICES
TRINITY COUNTY OUTPATIENT CLINIC

Psychiatric Evaluation

NAME: JOHNNY PAUL PENRY CASE: ~~1264~~ 7722

WORKER: FELIX PEEBLES, M.D. DATE: May 19, 1977

PRESENTING PROBLEM:

This client was referred to the Trinity County Outpatient Clinic for psychiatric evaluation by Polk County District Judge Ernest C. Coker.

PERSONAL HISTORY:

This client is a 21 year old white single male who was born May 5, 1956. He was born in Lawton, Oklahoma and has lives much of his life in Texas. There is no history of abnormality in his birth, however he does have a history of temper tantrums, bedwetting, and nightmares and does occasionally bite his nails. He indicates that the bedwetting is still a problem at times.

He was very slow to learn and had a later than average history of learning to walk and talk and do all of the other things that average children do. He was entered in the 1st grade in school and went most of that year but did not proceed in school. He had difficulty learning and understanding and could not compete with the other first graders. He has never learned to read and write.

He says he is in good physical health and he has had no major illnesses and no major surgery. He said he had some tests in Ben Taub Hospital in Houston but he does not know the date. He said he was in one accident about 6 months ago after he had stolen a car. There were no apparent ill effects. He is not under a physician's care at this time and is not taking any medication. He believes he remembers taking some Mellaril and Thorazine back through the years from time to time.

He has held a number of jobs mostly around restaurants such as busboy or dishwashing. He does relate that he worked at the Sirloin Stockade in Lufkin, Texas but he was fired because he took the ice cream machine apart to clean it and could not put it back together. He thinks it was about 10 weeks that he was on the job at that location.

The client's father is John Penry, age 42 and is described as being in good physical health. The client indicates that he does not have a good relationship with his father. He says he has a lot of childhood memories of his father always being too hard on him. He has expressed being afraid of his father. He says his father calls him retarded and that this makes him very mad because he is not retarded. He just has some difficulty in learning.

cover up his offenses. He said he meant no harm to the woman whom he raped that he had never had a woman before and he wanted to see what it would be like to have a woman. He admits that he has been having problems with the law and with other people for as long as he can remember.

MENTAL STATUS:

His speech is fairly spontaneous and is entirely coherent and relevant at the time of this interview. I see no evidence of any auditory or visual hallucinations or of any delusional thought content or psychotic thought process at the time of this interview. His psychomotor activity is slightly accelerated and his mood is quite anxious and his affect is appropriate for his mood.

He is oriented as to the month and date of it being May 19, but he is unsure of the year. He guesses all the way from 1971 to 1975. His memory is moderately impaired for both recent and remote past events. On retention and recall he can only repeat one number correctly in forward order and none in reverse order, whereas the average person can repeat 5 or 6 numbers correctly both in forward order and reverse order. He is unable to interpret proverbs at all and certainly is unable to do any abstract thinking. On his grasp of general information he reveals that he believes Nixon is President and has no idea who the Vice President of the United States or the Governor of Texas, or of any other important people are at this time. His judgement and insight are quite severely impaired.

DIAGNOSIS:

1. Mental Retardation- moderate.
2. Adjustment Reaction of Adult Life.

It is my professional opinion that Johnnie Paul Penry is presently competent to stand trial and assist his counsel in the preparation of his defense. However, he is moderately retarded and his judgement and insight are moderately to severely impaired. He also has some antisocial features which account for him not learning by his past mistakes and making some of the same mistakes over again. He has little regard for others or even himself. His primary interests being immediate gratification of his impulses even without regard to consequence to himself.

It is my further professional opinion that Johnnie Paul Penry is and was sane at the time of the commission of the offense. At that time, and certainly at this time, he shows no evidence of psychosis or a break with reality or of not being aware of what he was doing or what was going on around him. It is true that his judgement and insight are impaired but he is sane in the legal sense.

It is my further professional opinion that if Johnnie Paul Penry were released from custody that he would be dangerous to other persons. I base this judgement on the fact that he tells me he did have a weapon and did produce this weapon and did threaten the woman with a switch blade knife if she did resist him. He does not have adequately developed internal self controls and has a long history of conflicts with people and difficulty with his interpersonal relationships leading back to childhood

This client's mother is Shirley Penry and the client does not know her age. He says, "My mom takes care of me". He believes his parents are divorced and that there is some conflict between his parents and that there has been some conflict for as long as he can remember. He prefers his mother to his father.

This client is the 2nd of 4 siblings, he has an older sister 23 years of age and he does not get along with her because, "She tells on me". There is a younger sister age 18 and a younger brother who is 15. Prior to the time he got into his present trouble he was living with his step-brother who is 23 years of age.

He remembers fighting with his parents when he was growing up and running away from home quite a bit. He indicates that he was physically abused as a child which caused his rebellious reactions.

PRESENT ILLNESS:

This client is a 21 year old Mexican-American single male who has a history of having been admitted to Austin State Hospital and transfered to Rusk State Hospital because he was a legal resident of Polk County which was in Rusk State Hospital's catchment area. This was from the latter part of 1973 until the early part of 1974. He relates the story of seeing a woman in Livingston and he liked her looks very much and told her a story about his brother getting in a car wreck and wanting him to take her down the street to it and gained entrance into the car. He related that he had a switch blade knife and he produced it and ordered her to drive out of town and came to a road turning off of the highway where there was a gate. He said he ordered her to ram the car through the gate and break it down and she did not and he took the wheel of the car and broke through the gate and drove down into an area out of sight from the road and did have sexual intercourse with her.

They were driving back toward Livingston, Texas and something happened to the car and he and the female whom he had abducted and with whom he had had sexual intercourse got out and started walking. They met a pickup and he got out in the middle of the road and flagged the pickup down. He asked for a ride and at that time the woman told the man that she had been abducted and raped by this client, Johnnie Paul Penry, at which time the man produced a shotgun he had in the pickup and held it on Johnnie Paul Penry and turned him in in Livingston, Texas for this offense. Johnnie says he is charged with Kidnapping and Rape.

He believes this was in February but he does not know what date and says that he has not seen an attorney and does not know when disposition will be made of his case. He thinks he has been in the Polk County Jail for about three months.

He says that he has been arrested many times for problems relating to stealing, arson, and other crimes. He relates that he has on occasion heard voices and saw things, but he is very vague and I feel that he probably learned this in Rusk State Hospital and is using this as an excuse to

and conflicts with his parents. And by his own admission he has been arrested "many times" for problems relating to stealing, arson, and other crimes. A person of this sort who is moderately mentally retarded does not comprehend properly what is going on around him and frequently responds inappropriately. Another thing that is disturbing is antisocial features which he has exhibited consisting of the apparent inability to love or be loved, to make lasting friends, to develop adequate interpersonal relationships, lack of regret for past offenses. He also has not learned from his mistakes and is likely to continue making some of his same mistakes over again.

Felix Peebles, M.D.
Psychiatrist

FP/mw

APPENDIX L

STATE STATUTORY PROVISIONS INVOLVED

Current Texas Code of Criminal Procedure Article 37.071

Relevant Portion Emphasized

Art. 37.071. Procedure in capital case

Sec. 1. If a defendant is found guilty in a capital felony case in which the state does not seek the death penalty, the judge shall sentence the defendant to life imprisonment.

Sec. 2. (a) If a defendant is tried for a capital offense in which the state seeks the death penalty, on a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court and, except as provided by Article 44.29(c) of this code, before the trial jury as soon as practicable. In the proceeding, evidence may be presented by the state and the defendant or the defendant's counsel as to any matter that the court deems relevant to sentence, including evidence of the defendant's background or character or the circumstances of the offense that mitigates against the imposition of the death penalty. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death. The court, the attorney representing the state, the defendant, or the defendant's counsel may not inform a juror or a prospective juror of the effect of a failure of a jury to agree on issues submitted under Subsection (c) or (e) of this article.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, and

(2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7 01 and 7 02, Penal Code, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken

(c) The state must prove each issue submitted under Subsection (b) of this article beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted under Subsection (b) of this Article

(d) The court shall charge the jury that

(1) in deliberating on the issues submitted under Subsection (b) of this article, it shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty,

(2) it may not answer any issue submitted under Subsection (b) of this article "yes" unless it agrees unanimously and it may not answer any issue "no" unless 10 or more jurors agree, and

(3) members of the jury need not agree on what particular evidence supports a negative answer to any issue submitted under Subsection (b) of this article

(e)(1) The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b) of this article, it shall answer the following issue:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

(2) The court, on the written request of the attorney representing the defendant, shall

(A) instruct the jury that if the jury answers that a circumstance or circumstances warrant that a sentence of life imprisonment rather than a death sentence be imposed, the court will sentence the defendant to imprisonment in the institutional division of the Texas Department of Criminal Justice for life, and

(B) charge the jury in writing as follows

"Under the law applicable in this case, if the defendant is sentenced to imprisonment in the institutional division of the Texas Department of Criminal Justice for life, the defendant will become eligible for release on parole, but not until the actual time served by the defendant equals 40 years, without consideration of any good conduct time. It cannot accurately be predicted how the parole laws might be applied to this defendant if the defendant is sentenced to a term of imprisonment for life because the application of those laws will depend on decisions made by prison and parole authorities, but eligibility for parole does not guarantee that parole will be granted."

(f) The court shall charge the jury that in answering the issue submitted under Subsection (e) of this article, the jury

(1) shall answer the issue "yes" or "no",

(2) may not answer the issue "no" unless it agrees unanimously and may not answer the issue "yes" unless 10 or more jurors agree,

(3) need not agree on what particular evidence supports an affirmative finding on the issue, and

(4) shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness

(g) If the jury returns an affirmative finding on each issue submitted under Subsection (b) of this article and a negative finding on an issue submitted under Subsection (e) of this article, the court shall sentence the defendant to death If the jury returns a negative finding on any issue submitted under Subsection (b) of this article or an affirmative finding on an issue submitted under Subsection (e) of this article or is unable to answer any issue submitted under Subsection (b) or (e) of this article, the court shall sentence the defendant to confinement in the institutional division of the Texas Department of Criminal Justice for life

(h) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals

(i) This article applies to the sentencing procedure in a capital case for an offense that is committed on or after September 1, 1991 For the purposes of this section, an offense is committed on or after September 1, 1991, if any element of that offense occurs on or after that date

Former Texas Code of Criminal Procedure Article 37.071

Art 37 071 Procedure in capital case

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment The proceeding shall be conducted in the trial court before the trial jury as soon as practicable In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas The state and the defendant or his counsel shall be permitted to present argument tor or against sentence of death

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result,

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted

(d) The court shall charge the jury that

(1) it may not answer any issue "yes" unless it agrees unanimously, and

(1) it may not answer any issue "yes" unless it agrees unanimously, and

(2) it may not answer any issue "no" unless 10 or more jurors agree

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals

Art 35 22 Oath to jury

When the jury has been selected, the following oath shall be administered them by the court or under its direction "You and each of you do solemnly swear that in the case of the State of Texas against the defendant, you will a true verdict render according to the law and the evidence, so help you God"

GRANTED

Supreme Court, U.S.
FILED
NOV 1 2000
CLERK

No. 00-6677
00-A-347

In The
Supreme Court of The United States

JOHNNY PAUL PENRY,
Petitioner,

v.

GARY JOHNSON, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

On Petition For Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit
and on Application for Stay of Execution

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. **Whether the lower court correctly determined that Penry's mitigating evidence was within the jury's effective reach under the special issues and jury instructions submitted at the punishment phase of trial.**

2. **Whether the lower court correctly determined that a defense-requested, court-ordered psychiatric evaluation could be used by the State to rebut psychiatric evidence introduced by Penry at both phases of trial.**

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No. 00-6677
00-A-347

In The
Supreme Court of The United States

JOHNNY PAUL PENRY,
Petitioner,
v.

GARY JOHNSON, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,
Respondent.

On Petition For Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit
and on Application for Stay of Execution

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Gary Johnson, Director, Texas Department of Criminal Justice, Institutional Division, respondent herein, by and through the Attorney General of Texas, and files this brief in opposition.[1] Penry, in custody pursuant to a presumptively valid capital murder conviction and sentence of death and currently scheduled for execution on November 16, 2000, asks the Court to review the opinion of the United States Court of Appeals for the Fifth Circuit denying his application for a certificate of appealability ("COA") from the judgment of the district court denying his petition for federal writ of habeas corpus.

[1] For clarity, the petitioner will be referred to as "Penry" and the respondent as "the Director."

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit denying Penry's COA is attached to the petition as Appendix A. *Penry v. Johnson*, 215 F.3d 504 (5th Cir. 2000).

JURISDICTION

Penry seeks to invoke the jurisdiction of the Court to review the circuit court's denial of a COA under the provisions of 28 U.S.C. §1254(1). *See Hohn v. United States*, 118 S. Ct. 1969 (1998).

CONSTITUTIONAL PROVISIONS INVOLVED

Penry bases his claims upon the Fifth, Eighth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF CASE

A. Course of Proceedings and Disposition Below

In November 1979, Penry was charged by an indictment filed in the 258th Judicial District Court of Polk County, Texas, with the capital offense of intentional murder of Pamela Carpenter during the course of committing an aggravated rape. 1 Tr 1.[2] Venue was transferred to Trinity County, where, following a competency hearing, Penry was convicted of capital murder and sentenced to death. Penry's conviction and sentence were affirmed on

[2] "Tr" refers to the documents filed in the underlying cause, or transcript, preceded by volume number and followed by page number. "SR" refers to the transcription of the trial proceedings, or statement of facts, preceded by volume number and followed by page number. "SX" refers to the numbered exhibits offered by the State and admitted into evidence at trial.

direct appeal, and this Court denied certiorari review. *Penry v. State*, 691 S.W.2d 636 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 1073 (1986). State habeas relief was denied in 1986. *Ex parte Penry*, No. 15,918-01. Federal habeas relief was denied by the United States District Court for the Eastern District of Texas, Lufkin Division, on April 28, 1987. *Penry v. McCotter*, No. L-86-89-CA. The lower court affirmed on November 25, 1987. *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987). This Court, however, reversed, holding that Penry's rights were violated by the jury instructions submitted at the punishment phase of his trial. *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*").

On retrial, venue was transferred to Walker County. 1 Tr 96. Following a second competency hearing, Penry was tried before a jury on his plea of not guilty. 1 Tr 103, 199-200. On July 9, 1990, the jury found Penry guilty of the capital offense. 4 Tr 1005. On July 17, 1990, after a separate punishment hearing, the jury answered affirmatively the three special issues submitted pursuant to former article 37.071(b) of the Texas Code of Criminal Procedure. 5 Tr 1330-32. In accordance with state law, the trial court assessed punishment at death.

The Court of Criminal Appeals affirmed the conviction and sentence on direct appeal on February 22, 1995, and this Court denied certiorari review on November 13, 1995. *Penry v. State*, 903 S.W.2d 715 (Tex. Crim. App.), *cert. denied*, 516 U.S. 977 (1995). Penry's application for state habeas relief was denied by the Court of Criminal Appeals, after an evidentiary hearing, on December 3, 1997. *Ex parte Penry*, No. 15,918-02. On March 2, 1998, Penry filed a petition for federal habeas relief in the United States District Court for the Southern District of Texas, Houston Division. By orders entered on March 30, 1999, the district court denied relief and COA. *Penry v. Johnson*, No. H-97-4094 (S.D. Tex.). The

lower court denied COA on June 20, 2000, and denied rehearing on July 25, 2000. *Penry v. Johnson*, 215 F.3d 504 (5th Cir. 2000). The instant petition for writ of certiorari followed.

B. Statement of Facts

1. Guilt-Innocence Phase

On the morning of October 25, 1979, Pamela Carpenter telephoned a close friend for help, managing to say that she had been raped and stabbed. 42 SR 130-32. When the first officer arrived on the scene, Carpenter gave a description of her attacker as being a white male, slender, and short with short black curly hair cut up over the ears. 42 SR 173-74. Carpenter was taken to a hospital and gave the same description of the assailant before she died, again noting that she had been raped. 42 SR 205-06; 43 SR 262. She stated that she had seen the attacker in the area but did not know him personally and that he had "used scissors on me." 43 SR 264, 278.

Later that same day, Penry was found to have two fresh small puncture wounds close together on his back, 42 SR 209-210, which were consistent with being stabbed by scissors which were found at the scene. 44 SR 515-17, 520, 643-44. Further, Penry was short and thin, with curly black hair cut above the ears. 42 SR 214-16; 43 SR 314. Penry initially stated that his back injury occurred when he fell off of his bicycle that morning and landed on a stick. 43 SR 294. After being given his warnings and stating that he understood them, Penry consented to obtaining the shirt he had been wearing earlier, 43 SR 296, 299, 323-25, and then accompanied officers to the crime scene, where he remained unguarded in a patrol car with a door open. 43 SR 300-02. After about forty-five minutes, Penry called an officer over and stated, despite being told to be quiet, "I want to get it off my conscience, I done it." 43 SR 303-04. After going inside the house and explaining what had happened in detail,

Penry was taken back to the police department and read his warnings by a justice of the peace. 43 SR 306, 351-52, 385. However, before he could sign them, Penry's father arrived and read the warnings to Penry again. 43 SR 353, 386. At that time, Penry again admitted that he had done it. 43 SR 357. Several officers present testified that they had had conversations with Penry in the past and had no reason to suspect his mental capacity. 43 SR 315, 366-67, 419.

Penry's oral confession was written down by an officer who then had his notes transcribed and read back to Penry. Two non-law-enforcement witnesses were called in, and the statement was read to him again, including the standard warnings. Penry said he understood the warnings and initialed them, answered questions about the crime by one of the civilian witnesses, even demonstrating his injuries, and then signed the statement. 43 SR 394-96, 446-49.[3]

The next day, another officer (who had not seen the first statement or been involved in the investigation) talked to Penry, and again read him his rights. After telling Penry that he could stop him at any time for a further explanation of his rights, the officer explained them individually at length. The officer then had Penry explain the rights back to him. He then took Penry's statement down, reading each sentence back to Penry as he typed it. Again, civilian witnesses were called in, the statement (including the warnings at the beginning) was read to Penry, and he signed it. 44 SR 544-51, 558-62, 609.

The prior testimony of the deceased medical examiner was read to the jury. He

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[3] In the statement, Penry noted that he met the victim when he helped install a stove and a freezer at her house about three weeks earlier. 43 SR 401. This was confirmed by his temporary employer, who also noted that he did not feel that Penry was retarded. 43 SR 457-58, 470.

testified that the victim had a bruise near one eye, a bruise on her hip, and bruising on the neck which was consistent with strangling. He also found a bruise on her chest in the shape of a shoe heel which caused one of her kidneys to rupture. Finally, he found a stab wound to the chest which went into the lung and was consistent with having been caused by scissors. SX 82 at 2073-79, 2087-92.

The defense presented documentary evidence from Penry's youth indicating full scale IQ scores of between 51 and 60, indicating that Penry had been eager to please when taking his IQ tests, and indicating brain damage and a moderate to severe perceptual-motor problem. 45 SR 678-692. In response, the State presented the testimony of a psychiatrist, Dr. Fred Fason. Dr. Fason testified that Penry did not have a significant degree of brain damage, that he was between mildly mentally retarded and dull normal (having scored over 70 on both the verbal and the performance portions of different intelligence tests), and that he had an antisocial personality disorder, which, combined with very little formal education, could explain his low IQ test scores. 46 SR 796-802, 809, 813.

2. Punishment Phase

At the punishment phase of trial, the State introduced extensive evidence of Penry's criminal record and violent conduct, both in and out of prison.

In January 1982, Gregory Dennis, a guard at the Ellis I prison unit, found Penry trying to beat another inmate with a broom handle that had been made into a weapon. When Dennis returned Penry to his cell, Penry pulled out a "shank," comprised of a melted toothbrush containing a razor blade, which Dennis ultimately convinced Penry to turn over. 47 SR 953-55. Penry then asked Dennis to let him out of his cell so he could go "settle the matter." 47 SR 957.

Similarly, Ellis I guard Wallace Selman observed a confrontation between Penry and an inmate in June 1983. Penry brandished a board that had been broken into a makeshift pointed weapon and tried to jab it into the next cell, where the other inmate was located. When Selman tried to persuade Penry to turn over the board, Penry refused, saying, "I am going to get that motherfucker and when he comes by here, he has got to come out of his house, and when he does, I am going to get him." 47 SR 974-76.

Finally, Ellis I guard and eventual assistant warden Sanders Estes testified that he came to know Penry over a period of several years. On May 23, 1981, Penry was causing a disturbance in his cell and had made a homemade weapon by breaking off part of the shelf in his cell. Estes had to call for assistance and then physically took the board away from him. Penry then reached into his pocket, and Estes tackled him before he could pull out a "shank" fashioned from a razor blade melted into a toothbrush handle. 47 SR 1150-53.

In addition, prison employees testified that Penry was an aggressive inmate and had a bad reputation on Ellis I for being dangerous and assaultive. 47 SR 962-63 (Michael Grant), 981-83 (Selman), 1006-08 (Tim Keith), 1156 (Estes).

These prison guards also provided their observations of Penry's mental abilities. For instance, Selman testified that he never had any trouble communicating with Penry during the two and one-half years he had interactions with Penry. Notably, when on restriction, Penry would try to bargain with Selman to reduce the period of restriction in exchange for good behavior. 47 SR 978-80.

Guard Michael Grant dealt with Penry on a regular basis and testified that he and Penry were able to communicate, that Penry was able to understand prison rules, and that he observed Penry reading and writing. Grant noticed a change in Penry's behavior and

apparent abilities during the time that Penry's retardation was becoming a legal issue. 47 SR 965-68.

Guard Tim Keith had many conversations with Penry, and never had any trouble communicating with him. Keith had also seen Penry writing and looking at books in his cell. 47 SR 1003-04.

Frank Bragg, deputy sheriff of Trinity County, testified that he came to know Penry in 1979 and 1980. Bragg did not have problems communicating with Penry or understanding him. 47 SR 993-95. He also testified regarding one occasion during court proceedings on April 1, 1980, when Penry threw a large, heavy glass ashtray toward the district attorney and then lunged for the prosecutor. It took four officers to subdue Penry. 47 SR 997-1000.

Ellis I guard Sanders Estes talked to Penry on many occasions and testified that he could understand Penry and that Penry responded appropriately and appeared to understand him. Estes testified that he thought Penry could read and write. 47 SR 1157.

The State also introduced evidence of Penry's propensities for violence outside of prison. Jacalyn Howdeshell lived in Livingston, Texas, in 1979. She was barely acquainted with Penry because he had come into the restaurant where she worked and also helped her father do odd jobs. 47 SR 1010-11. On three occasions within a week of the instant capital murder, Penry upset Howdeshell by asking her to marry him. Penry said that she needed a man to protect her because there had been so many burglaries and rapes in the area. Howdeshell declined, and within a couple of days her home was broken into.[4] 47 SR 1014-

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[4] Penry referred to Howdeshell in one of his confessions: "If it had not been the chick I stabbed and killed, it would have been Jackie or some other chick, but, I don't think it would have been Jackie, because she wouldn't have fought me."; "Jackie is the one I had thought about raping." 47 SR 1038-41.

On July 25, 1977, Penry entered a guilty plea to the offense of rape in Cause No. 9886. He was sentenced to five years incarceration. 47 SR 1100-02. The victim of this rape, Diana Koch Reagan, testified to the facts of the offense. After work on February 16, 1977, Reagan drove to a department store in Livingston, but, before she could get out of the car, Penry got in the passenger side front seat. By making up a story about his brother being badly hurt in an accident on a nearby highway, Penry convinced Reagan that he needed her to take him there right away. Reagan got on the highway, but, when she noticed they were heading out of town, she told Penry she needed to go back and would have to let him out. When she tried to use her CB radio to ascertain the location of the "accident," she discovered that the wire to the microphone had been cut. At this point, Penry put a knife to Reagan's ribs, grabbed her hair, and told her to keep driving until he finally made her turn off onto a dirt road. After stopping, Penry raped her at knifepoint. 47 SR 1117-24, 1128-31.

The car got stuck after the assault, so Penry stopped a pickup truck, telling the occupants that he and his wife needed a ride. Reagan and Penry sat in the back.[5] When the truck stopped at a small grocery store, Reagan and Penry got out. Reagan began screaming, and Penry quickly told the truck's occupants that this was just how his wife behaved when she was having a tantrum. Reagan responded that she was not his wife but that he had kidnaped and raped her. By this point, one of the truck's occupants had pulled out a gun, and Penry then offered him several thousand dollars to forget the whole thing, but was refused.

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[5] There was a gun rack inside the cab of the truck, and Reagan did not want Penry in a position where he could reach the weapons. 47 SR 1134.

The police were summoned and arrested Penry. 47 SR 1132-38.[6]

In its case in chief, the defense presented evidence from a number of witnesses that Penry had been abused as a child by his mother. Many of these witnesses were impeached to some extent on cross-examination. For instance, though one of Penry's sisters (Sally Anderson) testified that Penry is mentally retarded and was severely abused, 48 SR 1082-91, she acknowledged that Penry's father was never aware of the abuse and that she herself had been convicted of burglary of a habitation. 48 SR 1100, 1104. Another sister (Trudy Ross) who testified to the mental retardation and abuse, 48 SR 1112-20, was impeached at length with prior testimony in which she had failed to discuss the extent of the abuse and in which she had testified that Penry had been violent and posed a behavior problem. 48 SR 1121-43. A brother (Jesse Penry) who testified to the retardation and abuse confirmed on cross-examination that he had himself been convicted of burglary of a habitation and also that Penry had physically hurt him when they were children. 48 SR 1153-55, 1160. An aunt (Patsy Ross) who testified to the retardation and abuse, admitted that Penry's mother took custody of Penry's little brother at one point after Penry attempted to have anal intercourse with the boy. She also recalled that Penry was arrested in Houston when he was seventeen years old for setting fire to an apartment complex. 48 SR 1216-26, 1228-30.

A psychologist who tested Penry, Dr. Randall Price, testified to his opinions that Penry was not faking on tests he had administered to Penry, 48 SR 1319-24, that Penry has a brain impairment resulting from generalized brain damage, 48 SR 1327, 49 SR 1448, 1497, that Penry is mildly mentally retarded, 48 SR 1331, 49 SR 1537-38, that the brain

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[6] During his confession to the instant capital murder, Penry's also confessed to the rape of Reagan. This portion of his confession was introduced at the punishment phase of trial, and was consistent with Reagan's testimony. 47 SR 1146-47.

impairment is a substantial cause of the mental retardation, 48 SR 1332, that brain impairment can cause problems in impulse control and judgment, 48 SR 1337-38, and that Penry's retardation and brain impairment are substantial factors in the development of his antisocial behavior. 49 SR 1511.

On cross-examination, Price acknowledged that he had strongly recommended that various tests be performed to substantiate his findings of brain damage, but that all those tests came back with normal results. These tests included: an electro-encephalogram ("EEG"); a magnetic resonance imaging ("MRI"); a positron emission test ("PET scan"); a "Tec scan" (an updated version of the "CAT scan"); and a screening for genetic syndromes that may lead to retardation. 49 SR 1500-07. Price acknowledged that various school and mental health records on Penry refer to his having committed various acts of arson, and his fighting with, and even setting fire to, other patients. 48 SR 1368-75. Though Price refused to diagnose Penry as having an antisocial personality, he acknowledged that the history is positive for antisocial behavior. 48 SR 1380-81. Price also acknowledged that Penry knows the difference between right and wrong, and would be a dangerous person in the free world. 49 SR 1451, 1485.

Additionally, school records, admitted as evidence of retardation, also reflected that Penry was referred to the Mexia State School as a child because the family was unable to control him in the home, and that he was described as a high temper child who bit, pinched, and choked other children. Records also noted that Penry was uncontrollable in the classroom, had failed first grade, and was taken out of special education classes his second year because his behavior could not be controlled. 49 SR 1574-75.

In rebuttal, the State introduced the testimony of a psychologist, Dr. Walter Quijano,

who testified that, while Penry's intellectual capacity is between mild retardation and borderline, Penry is not actually mentally retarded in light of his adaptive, day-to-day skills. Quijano further testified that Penry has the ability to reason and to learn, that Penry knows the difference between right and wrong, and that Penry does not have brain damage. 50 SR 1634-35, 1647-48. Quijano opined that Penry has an antisocial personality and is more likely to engage in continuing acts of violence. 50 SR 1649-50, 1654.

Another psychologist, Dr. Stanton Samenow, testified that Penry's IQ scores had underestimated his intelligence by not measuring his adaptive and social skills. Penry's ability to plan his prior crimes, think ahead, and think on his feet are examples of adaptive skills not taken into account. Samenow also noted that Penry is manipulative and has deliberately behaved differently in different circumstances. Thus, sometimes Penry would seek to avoid punishment through such things as threats to kill himself or claims that he had heard voices and seen things, while at other times he would become non-verbal and appear not to understand very much and attempt to use his mental retardation as an excuse for his actions. Samenow noted that Penry's criminal behavior expanded and intensified over the years and continued even in prison, and concluded that Penry was dangerous and that the prognosis for change is pretty bleak. 50 SR 1721-37.

REASONS FOR DENYING THE WRIT

I. THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THE COURT'S ATTENTION.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will only be granted for compelling reasons. As an initial matter, Penry filed his federal habeas petition on March 2, 1998, well after enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("the

AEDPA"). Accordingly, the AEDPA standard of review applies. *See (Terry) Williams v. Taylor*, 120 S. Ct. 1495, 1518 (2000) ("Because he filed his petition in December 1997, Williams' case is governed by the [habeas] statute as amended by AEDPA."); *(Michael) Williams v. Taylor*, 120 S. Ct. 1479, 1486 (2000) ("Petitioner filed his federal habeas petition after AEDPA's effective date, so the statute applies to his case."). Regarding claims which were presented to, and ruled on by, the state courts, the AEDPA limits the authority of federal courts to grant relief to state prisoners to the following:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). In *(Terry) Williams v. Taylor*, Justice O'Connor delivered the opinion of the Court regarding interpretation of the AEDPA standard of review:

> Congress specifically used the word "unreasonable," and not a term like "erroneous" or "incorrect." Under §2254(d)(1)'s "unreasonable application" clause, then, a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

(Terry) Williams v. Taylor, 120 S. Ct. at 1522; *see also id.* at 1521 ("Stated simply, a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable."). Here, for the reasons discussed below, and in light of the AEDPA standard of review, Penry fails

to advance a compelling reason for this Court to review his case, and none exists. Accordingly, this Court should decline to exercise its certiorari jurisdiction to review Penry's claims.

II. THE JURY POSSESSED AN ADEQUATE VEHICLE FOR CONSIDERATION OF PENRY'S PROFFERED MITIGATING EVIDENCE.

Penry first claims that the jury was unable to give mitigating effect to his evidence of mental retardation, brain damage, and child abuse through the instructions given at the punishment phase of trial. The question presented is not whether Penry is in fact mentally retarded or brain damaged; both were disputed issues at trial. Nor is the question presented whether Penry in fact suffered severe childhood abuse at the hands of his mother; also a disputed issue at trial. Rather, the question presented is whether the jury at Penry's trial possessed an adequate vehicle to give effect to the defense-favorable evidence presented on these subjects. Penry's jury had such a vehicle. On direct appeal, the Court of Criminal Appeals determined that the "nullification instruction" was sufficient to meet the requirements of *Penry I*. *Penry*, 903 S.W.2d at 765. As the following discussion demonstrates, such a conclusion was objectively reasonable and dictates the denial of relief as found by the lower courts. *Penry*, 215 F.3d at 508-09; *Penry v. Johnson*, No. H-97-4094, slip op. at 20-27 (S.D. Tex. Mar. 30, 1999).

Penry's death sentence was based upon the jury's affirmative responses to the following three statutory punishment-phase issues:

> (1) Was the conduct of the defendant, JOHNNY PAUL PENRY, that caused the death of the deceased, PAMELA CARPENTER, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

(2) Is there a probability that the defendant, JOHNNY PAUL PENRY, would commit criminal acts of violence that would constitute a continuing threat to society?

(3) Was the conduct of the defendant, JOHNNY PAUL PENRY, in killing PAMELA CARPENTER, the deceased, unreasonable in response to the provocation, if any, by the deceased?

5 Tr 1330-31. To make certain it complied with this Court's holding in *Penry I*, the trial court gave the following supplemental instructions:

> You are instructed that if you return an affirmative finding on each of the special issues submitted to you, the court shall sentence the defendant to death. You are further instructed that if you return a negative finding on any special issue submitted to you, the court shall sentence the defendant to the Texas Department of Corrections for life. You are therefore instructed that *your answers to the special issues, which determine the punishment to be assessed the defendant by the court, should be reflective of your finding as to the personal culpability of the defendant*, JOHNNY PAUL PENRY, in this case.
>
> You are instructed that when you deliberate on the questions posed in the special issues, *you are to consider mitigating circumstances*, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. *If you determine, when giving mitigating effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.*

5 Tr 1329 (emphasis added).

Initially, Penry's reliance upon *Roberts v. Louisiana*, 428 U.S. 325 (1976), for the

proposition that these instructions resulted in an arbitrary and capricious death sentence is entirely misplaced. In *Roberts*, this Court declared unconstitutional Louisiana's mandatory death sentence statute because it failed to comply with the requirement of *Furman v. Georgia*, 408 U.S. 238 (1972), that standardless jury discretion be replaced by procedures that safeguard against the arbitrary and capricious imposition of death sentences. *Roberts*, 428 U.S. at 334. Under the Louisiana system, once a jury found a defendant guilty of first-degree murder, the defendant would be automatically sentenced to death; however, the jury in every first-degree murder case was instructed on the crimes of second-degree murder and manslaughter and permitted to consider those verdicts even if there was not a scintilla of evidence to support the lesser verdicts. *Id.* The Court found that the procedure "invite[d] the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they feel the death penalty is not appropriate," and thus injected into the sentencing determination an element of capriciousness forbidden by *Furman*. *Roberts*, 428 U.S. at 335. Louisiana's "implicit jury nullification" procedure did not pass constitutional muster because it skewed the "eligibility" decision encompassed in the jury's finding of guilt of first-degree murder, thus failing to adequately narrow the class of death-eligible defendants. *Id.* The punishment-phase instructions submitted at the end of a Texas capital murder trial cannot suffer the same defect because, under the Texas scheme, the constitutionally required narrowing at issue in *Roberts* takes place at the guilt-innocence phase.

To satisfy the requirements of the Eighth Amendment, a capital sentencing scheme must both (1) "genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder," *Zant v. Stephens*, 462 U.S. 862, 877 (1983), and (2) provide

for individualized consideration of the particular offender and offense. *Johnson v. Texas*, 509 U.S. 350, 360-61 (1993); *see also Barclay v. Florida*, 463 U.S. 939, 958 (1983). To find a defendant eligible for the death penalty in satisfaction of the first requirement, the jury must convict the defendant of murder and find one "aggravating circumstance" or its equivalent at either the guilt-innocence or punishment phase of trial. *Lowenfield v. Phelps*, 484 U.S. 231, 244-246 (1988); *Zant v. Stephens*, 462 U.S. at 878.

Under the Texas scheme, this constitutionally required narrowing function is performed by the penal statute defining the offense of capital murder, TEX. PENAL CODE ANN. § 19.03, which encompasses aggravating elements that distinguish capital murder from simple murder. *Jurek v. Texas*, 428 U.S. 262, 268-71 (1976) (opinion of Stevens, J., joined by Stewart and Powell, JJ.); *Lowenfield v. Phelps*, 484 U.S. at 243-46 (discussing narrowing function of Texas penal statute). It is at this stage that the procedure guards against arbitrary and capricious sentencing. Thus, where, as in Texas, this "eligibility" decision is performed at the guilt-innocence phase, further narrowing at the punishment phase is not required. *Lowenfield v. Phelps*, 484 U.S. at 246. The fact that the Texas sentencing jury must also answer special issues to impose the death penalty is not part of the constitutionally required narrowing process.

The Texas special issues, therefore, represent the second constitutional requirement, or the "selection" decision, where the jury determines whether a death-eligible defendant should in fact receive that sentence. "What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens*, 462 U.S. at 879 (emphasis in *Zant*). This Court has also stressed that "complete jury discretion" is permissible at the "selection" phase.

See Buchanan v. Angelone, 522 U.S. 269, 275-76 (1998) ("our decisions suggest that complete jury discretion is constitutionally permissible" once a defendant has been found eligible for a death sentence); *Tuilaepa v. California*, 512 U.S. 967, 979-80 (1994) ("the sentencer may be given 'unbridled discretion in determining whether the death penalty should be imposed after it has found the defendant is a member of the class made eligible for the death penalty'") (internal citation omitted).

Accordingly, unlike the unitary procedure at issue in *Roberts*, Texas' bifurcated scheme insulates the eligibility and selection decisions from one another. Therefore, the punishment-phase instructions submitted at the end of a Texas capital murder trial cannot skew the eligibility decision made by the jury during the guilt-innocence phase. It is clear, then, that the jury's first verdict, in which it found Penry guilty of capital murder, fulfilled the constitutionally required narrowing at issue in *Roberts* and adequately safeguarded against an arbitrary and capricious sentence.

Additionally, the standard for claims such as Penry raises is whether there is a "reasonable likelihood" the jury interpreted the punishment-phase instructions to preclude consideration of constitutionally relevant mitigating evidence. *Johnson*, 509 U.S. at 367 (*citing Boyde v. California*, 494 U.S. 370, 380 (1990)). The requirements of the Eighth Amendment are satisfied if the mitigating value of such evidence, as actually proffered at trial, is within the "effective reach" of the jury in responding to the punishment issues and instructions. *Johnson*, 509 U.S. at 368; *Graham v. Collins*, 506 U.S. 461, 475 (1993). "In evaluating the instructions, [a court should] not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would--with a 'commonsense understanding of the instructions in the light of all that has taken place

at the trial.'" *Johnson*, 509 U.S. at 368 (*quoting Boyde*, 494 U.S. at 381).

Contrary to Penry's assertions, the instructions given in this case did not impermissibly limit the jury's ability to consider and give effect to his mitigating evidence, nor did they require the jurors to violate their oaths in order to impose a life sentence. The trial judge specifically instructed the jury to consider Penry's personal moral culpability and then told the jury how to use its findings in that regard to impose a life sentence, if warranted. It told the jury to simply answer one of the special issues "no" if it believed that mitigating circumstances made a life sentence an appropriate response to Penry's personal culpability. The jury was not told to disregard the law; it was instructed how to obey the law (as decided by this Court and set forth by the trial judge) by imposing a life sentence ("reflected by a negative finding") if it found that such was appropriate. This directly satisfied the holding of *Penry I* that "[t]he jury was never instructed that it could consider the evidence offered by Penry as mitigating evidence and that it could give mitigating effect to that evidence in imposing sentence." *Penry*, 492 U.S. at 320.

Penry's argument that the "reflected by" language of the charge required mitigating evidence to fall under the literal language of the special issues is simply an incorrect reading of the instruction and also directly contradicts his arguments that this was a nullification instruction. The instruction did not require mitigating evidence to fall under the literal language of the special issues, it merely informed the jury how to give effect to mitigating evidence and impose a life sentence regardless of their initial answers to the questions.

In light of the language of the charge, there is no reasonable likelihood that the jury would have felt that it could not do that which the instructions specifically required. For the jury to believe that it would be violating the law to give effect to mitigating evidence in the

manner dictated by the charge would have rendered meaningless both the extensive mitigation instruction itself and the mitigating evidence which required it. *See Boyde*, 494 U.S. at 383 (finding jurors unlikely to construe instructions so as to transform defendant's presentation of "favorable testimony into a virtual charade")(citation omitted).

Further, the conduct of the attorneys supports the conclusion that Penry's mitigating evidence was within the jury's effective reach. At no time did the prosecution argue that the jury could not or should not vote "no" on a special issue unless Penry's evidence was relevant, in a mitigating fashion, to one of the three special issues. To the contrary, when prosecutors discussed mitigating evidence during punishment-phase summations, they focused on the fact that Penry's violence was not attributable to alleged mental retardation and childhood abuse and, therefore, his blameworthiness and culpability should not be reduced for these reasons. *See, e.g.*, 51 SR 1854-63, 1941-45.[7] In closing argument, defense counsel succinctly summarized the instructions with no contradiction from the prosecution: "If you think that because of this mitigating evidence the man deserves a life sentence, then, there has got to be a no on that verdict sheet somewhere." 51 SR 1903.[8] Again, where, as

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[7] During the initial group jury voir dire, the prosecutor had specifically told the venire that they could take mitigating evidence into consideration and, "if you feel like that [mitigating] evidence is strong enough that you feel like it would even warrant a lesser sentence than death . . . then you can answer one or more of these questions no, so that the defendant will receive a life sentence instead of the death penalty." 15 SR 186-87.

[8] Defense counsel argued more fully how the jury could give mitigating effect to Penry's evidence:

> Let me try to simplify it. If, when you thought about mental retardation and the child abuse, you think that this guy deserves a life sentence, and not a death sentence, decide life in prison is punishment enough, then, you got to answer one of those questions no. The Judge has not told you which question, and you have to give that answer, even if you decide the literally correct

here, all the parties were operating on the same, permissible understanding of the mitigation instruction, and the instruction specifically directed the jury to answer any special issue "no" if it believed mitigating evidence called for a life sentence, there is no reasonable probability that the jury misinterpreted the instruction in the manner Penry asserts.

For all the above reasons, the lower courts' rejection of this claim under the AEDPA standard of review was entirely correct and reasonable. Accordingly, this claim does not warrant the granting of certiorari review.

III. THE STATE'S USE OF A DEFENSE-REQUESTED, COURT-ORDERED PSYCHIATRIC EXAMINATION TO REBUT PSYCHOLOGICAL EVIDENCE PRESENTED BY THE DEFENSE DID NOT VIOLATE THE FIFTH AMENDMENT.

In his final claim, Penry asserts that his Fifth Amendment rights under *Estelle v. Smith*, 451 U.S. 454 (1981), were violated by the State's punishment-phase use of a 1977 court-ordered psychiatric examination. As the following discussion demonstrates, however, the decisions of the lower courts were objectively reasonable under the AEDPA and dictate the denial of relief. *Penry*, 215 F.3d at 509-11 (also addressing additional Fifth and Sixth Amendment claims not raised in the instant petition); *Penry v. Johnson*, No. H-97-4094, slip op. at 47-60 (S.D. Tex. Mar. 30, 1999) (same); *Penry*, 903 S.W.2d at 757-60 (same).

Under *Estelle v. Smith*, a "capital defendant's Fifth Amendment right against compelled self-incrimination precludes the state from subjecting him to a psychiatric examination concerning future dangerousness without first informing the defendant that he

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answer is yes. Not the easiest instruction to follow, and the law does funny things sometimes, but, it is what it says, and I have taken all this time with you to make sure you understand what it says.

51 SR 1903.

has a right to remain silent and that anything he says can be used against him at a sentencing proceeding." *Powell v. Texas*, 492 U.S. 680, 681 (1989). As a corollary to *Estelle v. Smith*'s rule of exclusion, however, the Court has consistently recognized the State's right to use a court-ordered psychiatric examination to rebut psychological evidence introduced by the defense at trial. *See, e.g., Estelle v. Smith*, 451 U.S. at 472 (noting that "a different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase"). Thus, "if a defendant requests a psychiatric examination in order to prove a mental-status defense, he waives the right to raise a Fifth Amendment challenge to the prosecution's use of evidence obtained through that examination to rebut the defense." *Powell*, 492 U.S. at 684.

Further, the Court held in *Buchanan v. Kentucky*, 483 U.S. 402, 423 (1987), that the prosecution's use of a psychiatric report to rebut the psychological evidence and reports introduced by the defendant to establish his defense of "extreme emotional disturbance" was proper. The Court reasoned, "with petitioner not taking the stand, the Commonwealth could not respond to this defense unless it presented other psychological evidence." *Id.* Accordingly, just as a defendant who takes the witness stand waives his Fifth Amendment privilege and may be impeached with prior, unwarned statements,[9] a defendant who uses psychiatric evidence at trial waives his right to exclude otherwise inadmissible psychiatric evidence.

Penry's Fifth Amendment complaint presently before the Court concerns the admission of a 1977 report of an examination conducted of Penry by psychologist Felix Peebles in connection with a then pending charge of rape and which contained an opinion

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[9] *See, e.g., Harris v. New York*, 401 U.S. 222, 225-26 (1971).

that Penry would be a danger if released in the future. 49 SR 1510. The report was admitted during the cross-examination of one of Penry's punishment phase expert witnesses, Dr. Randall Price, as a business record *and something Dr. Price had relied upon in reaching his opinions in this case*. 49 SR 1404-06, 1429-31. Penry's argument that the admission of the Peebles report violated his Fifth Amendment protections rests largely upon Penry's blanket assertion that the examination was compelled because it was court ordered in 1977. However, Penry's attorney on that prior charge testified unequivocally at a hearing during the instant trial that the examination was ordered at defense counsel's request. 47 SR 1058. Thus, the Court of Criminal Appeals reasonably held that the Fifth Amendment was not implicated because Dr. Peebles was acting as a defense agent, not as a state agent conducting a custodial interrogation. *Penry*, 903 S.W.2d at 759-60 ("at the time appellant made his statements, he was not confronted with someone who was essentially an agent of the state") (internal citation and quotes omitted); *see also Estelle v. Smith*, 451 U.S. at 467 (stressing that the defendant in that case did not initiate the psychiatric evaluation which was used against him and was not examined by someone acting solely in his interest); *Buchanan*, 483 U.S. at 422-23 ("if a defendant requests [the psychiatric] evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution.").

Additionally, the State permissibly used the results of a number of prior psychiatric examinations, including the 1977 evaluation, to counter psychological evidence introduced by the defense at both phases of the trial. For instance, at the guilt-innocence phase, the

defense introduced selected portions of Penry's mental health records. 45 SR 674-77. Those selected by Penry reflected his low scores on intelligence tests as well as the examiners' impressions that Penry was doing his best and trying to please. 45 SR 678-92. This evidence, if credited, supported the defensive theories that Penry lacked the mental capacity to knowingly and intelligently waive his *Miranda*[10] rights, that Penry falsely confessed in order to please the authority figures represented by law enforcement officers, and that Penry was incapable of acting with criminal intent. *See* 46 SR 893-99 (urging these theories during guilt-innocence phase summation); *see also* 51 SR 1909 (arguing in punishment phase summation that Penry's admission in his confession that he knew beforehand that he was going to have to kill the victim was false because mentally retarded people such as Penry want to appear smart and do not want to admit they have acted rashly).

The Peebles report (admitted at the punishment phase) reinforced the State's rebuttal testimony of Dr. Fred Fason at the guilt-innocence phase that, despite Penry's below normal scores on intelligence tests, Penry's intellect and adaptive skills rendered him capable of understanding and waiving his *Miranda* rights and capable of correctly relating the facts set forth in his confessions. 46 SR 766-68, 787-88. It further supported Dr. Fason's testimony that Penry had an antisocial personality, a factor which Fason testified could explain Penry's low scores on intelligence tests and also indicative that Penry was unlikely to confess out of a desire to please authority figures. 46 SR 790-91, 796-805.

The report similarly rebutted Penry's mitigation arguments at the punishment phase. Again, in response to the defense evidence that Penry was truly as mentally retarded as his test scores indicated, the report supported the testimony of the State's experts that Penry was

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[10] *Miranda v. Arizona*, 384 U.S. 436 (1966).

actually malingering regarding his mental abilities. 50 SR 1728-29 (Dr. Samenow testifying that Penry would use mental retardation as an excuse for his behavior); *see also* 50 SR 1644 (Dr. Quijano testifying that the presence of an antisocial personality disorder is a factor in the analysis of whether someone is malingering).

Additionally, using anecdotal evidence and the expert testimony of Dr. Price, a clinical and neuro-psychologist who based his opinions in part on an eleven hour examination of Penry, the defense sought in the punishment phase to persuade the jury that Penry's violence was attributable to childhood abuse and mental retardation or brain impairment. For example, Dr. Price testified that "brain impairment of this type, causes the person problems in areas such as . . . impulse control, . . . tolerance, it decreases that. It affects their judgment and their ability to reason." 48 SR 1331-38. In rebuttal, the State presented evidence, including the Peebles report and expert testimony, that Penry's violence was attributable to his antisocial personality rather than to childhood abuse and mental retardation, if any. The prosecutor made this point in his cross-examination of Dr. Price:

> Prosecutor: [Y]ou are telling this jury that he is mentally retarded . . . and that, that could be a contributing cause to the criminal acts, is that right?
>
> Price: In so many words.
>
> Prosecutor: Is that what you told this jury on direct examination?
>
> Price: That, it influences that he has engaged in criminal activities?
>
> Prosecutor: Psycho-path also, does the same thing, doesn't it, Doctor?
>
> Price: Certainly.

48 SR 1359-60. Dr. Price summarized his opinion by testifying that Penry "looks more like

people with brain damage that I have seen than those with anti-social personality." 48 SR 1381. He added, "I think in this particular case, that the extent of mental retardation and brain impairment are substantial factors in the development of anti-social behavior in Johnny Paul Penry." 49 SR 1511. The State's experts, however, testified that Penry's violence was more attributable to his antisocial personality than to any mental retardation. *See, e.g.*, 50 SR 1624, 1648-52 (Dr. Quijano testifying that incidents of violence are not higher among the mentally retarded); 50 SR 1732-33 (Dr. Samenow testifying that "Penry was a person who really, simply made a series of choices over time not to live within the . . . norm and standards of society," and that this was consistent with an antisocial personality disorder but probably inconsistent with mental retardation).

In light of the many issues raised by the defense to which the report was useful rebuttal, Penry has failed to demonstrate that the report's use by the prosecution violated the Fifth Amendment. In any event, the lower courts' conclusions that no Fifth Amendment violation occurred was at least reasonable under the AEDPA.

Finally, even where such error occurs, federal habeas relief is not warranted unless the error had a "substantial and injurious" effect on the verdict under *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993). Here, given that Penry's own expert relied upon the 1977 evaluation, given Penry's extensive acts of violence in and out of prison (including the brutal nature of the instant offense), given that none of the State's experts relied to any significant extent upon the 1977 evaluation for their opinions, given the testimony from four prison guards that they believed Penry would be a future danger, and given the inculpatory and remorseless statements in his confessions, the jury's verdict cannot be said to have been affected by admission of the Peebles report, even if it was erroneously admitted.

IV. PENRY HAS NOT SATISFIED THE STANDARD FOR OBTAINING A STAY OF EXECUTION.

Penry is not entitled to relief on his application for stay of execution. In deciding whether to grant a stay, the Court is guided by the following standard:

> [T]here must be a reasonable probability that four Members of the Court would consider the underlying issue sufficiently meritorious for the grant of certiorari or the notation of probable jurisdiction; there must be a significant possibility of reversal of the lower court's decision; and there must be a likelihood that irreparable harm will result if that decision is not stayed.

Barefoot v. Estelle, 463 U.S. 880, 895-96 (1983) (citations omitted). Because it is clear that the lower courts correctly resolved the issues presented and that their resolution only involved the application of well-established precedent to the facts of this case, it is highly improbable that certiorari will be granted, much less that the decision below will be reversed. Penry thus cannot satisfy the standard for obtaining a stay.[11]

CONCLUSION

For the foregoing reasons, the Director respectfully requests that Penry's petition for writ of certiorari and application for stay of execution be denied.

Respectfully submitted,

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Attorney General of Texas

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[11] Penry previously raised both of the issues presently before the Court in his petition for writ of certiorari to the Court of Criminal Appeals on direct appeal. Additionally, in his application for stay, Penry included a third claim: namely, that *his* evidence of mental retardation, brain damage, and severe childhood abuse, rendered him constitutionally ineligible for the death penalty under the Eighth Amendment. Such a claim was not raised in the petition, and Penry subsequently filed a corrected application for stay deleting reference to this third claim. Accordingly, this claim is not addressed herein.

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IN THE
SUPREME COURT OF THE UNITED STATES

JOHNNY PAUL PENRY,
Petitioner,
vs.
GARY L. JOHNSON,
Director, Texas Department of Criminal Justice,
Institutional Division
Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* AAMR; ADVOCACY, INC.; THE ARC OF THE UNITED STATES; THE ARC OF TEXAS; AASSID; THE BRITISH INSTITUTE OF LEARNING DISABILITIES; IASSID; AND TASH; IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The American Association on Mental Retardation ("AAMR") is the nation's oldest and largest interdisciplinary organization of professionals in the field of mental retardation. Founded in 1876, AAMR has long been interested in legal issues involving people with mental retardation.

Advocacy, Inc. is the federally funded and designated Protection and Advocacy System for individuals with disabilities in the state of Texas. Annually, it represents or advises over 10,000 Texans with physical or mental disabilities, including mental retardation.

The Arc of the United States is a national voluntary association of parents, families and friends of people with mental retardation, along with members who have mental retardation. ARC has a national membership of over 140,000 people organized in some 1,000 local and state-wide chapters.

The Arc of Texas is a voluntary association of persons with mental retardation, their families, friends and those who provide services to them, working to expand opportunities for people with mental retardation and other developmental disabilities to be included in their communities.

The British Institute of Learning Disabilities (BILD), an independent registered charity in the United Kingdom, works to promote good practice in the provision and planning of health and social care services for persons with developmental disabilities and to promote an awareness of the issues which they face as a result of their disability.

The Australian Association for the Scientific Study of Intellectual Disabilities (ASSID) is a scientific organization which brings together those working in the field of intellectually disability and promotes the study and understanding of intellectual disability through publications, conferences, national networks, symposia and other activities.

The International Association for the Scientific Study of Intellectual Disabilities (IASSID) is the only world-wide scientific body for the study of intellectual disabilities. Given the inherent difficulties persons with intellectual disabilities, referred to in the United States as "mental retardation," face in the cognitive areas of communication, memory and moral reasoning, IASSID strongly opposes the execution of persons with an intellectual disability.

TASH is an international advocacy association of people with disabilities, their family members, other advocates, and people who work in the disability field. TASH has chapters throughout the USA and Canada and members from thirty-eight countries around the world. TASH's mission is to eliminate physical and social obstacles that prevent equity, diversity and quality of life.

None of the parties or their counsel have contributed either monetarily to the preparation of this brief, except that the law offices of Paul, Weiss, Rifkind, Wharton & Garrison, 1285 Avenue of the Americas, New York, NY 10019 provided printing and copying services. Specifically, only the amici, their members and their counsel have made substantive contributions to the preparation or submission of this brief.

For the reasons set forth in this brief, the *Amici* respectfully urge this Court to grant certiorari to consider the important issues presented in this case.

I. SUMMARY OF ARGUMENT

This appeal arises from the decision of the United States Court of Appeals for the Fifth Circuit to deny Petitioner a Certificate of Appealability in this § 2254 capital habeas proceeding.[1/] In denying petitioner's motion, the court relied on the rule for granting federal habeas relief in petitions filed after the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) as stated in *Miller v. Johnson,* 200 F. 3d 274, 280-81 (5th Cir. 2000): that relief may be grnated if the state court decision 'was contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent. That standard is met in this case where the state court unreasonably utilized the very same jury instructions in the retrial of petitioner as those found constitutionally infirm by this Court in his first trial, attempting to remedy the infirmity by adding an instruction that would require jury nullification in order to assess a sentence other than death, after finding petitioner guilty of capital murder. Even apart from this issue, the Court should grant certiorari to review the impact of events of the past decade upon the standard defined in that *Penry I* for support of a ban on the execution of persons with mental retardation.

In 1972 this Court found the death sentence of William Henry Furman so harsh, freakish, and arbitrary that it halted executions nationwide. *Furman v. Georgia,* 408 U.S. 238 (1972). Like Penry, Furman was a man encumbered with both

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1/ This *Amicus Curiae* brief is submitted in support of the Petitioner, Johnny Paul Penry. Amici Counsel have personally consulted Tommy Skaggs in the Texas Office of the Attorney General on behalf of the Respondent and Robert Smith on behalf of the Petitioner. There is no opposition to the filing of this amicus brief.

poverty and mental retardation. Despite attempts by the states to remedy the arbitrariness of imposing the death penalty, the disproportionate application of that terrible weight continues to fall upon men with mental retardation and histories of deprivation and abuse.

Johnny Penry is a person with mental retardation. The disabilities that define and accompany mental retardation go to the heart of the meaning of "culpability" and "mens rea." Mental retardation corresponds directly to a defendant's capacity to understand and control his behavior; his ability to comprehend instructions, rules and warnings, included but not limited to *Fifth Amendment* warnings; his ability to participate meaningfully in his own defense; the appropriateness of a particular punishment for unacceptable or unlawful behavior, and the moral blame that should reasonably be attached to that behavior.

Here, we urge relief from a sentence of death imposed in a manner which violates the minimum constitutional standard set for jury instructions in the capital case of a person with mental retardation by the U.S. Supreme Court in the landmark case involving this very defendant. Amici agree with the arguments of Petitioner's counsel regarding the failure of the trial court to offer the jury in the penalty phase of his retrial a reasonable opportunity to consider the mitigating effect of his mental retardation. We, however, focus upon issues central to the interest of the *Amici,* those reasons that mandate a ban upon executing persons with mental retardation because all such executions are violations of the Eighth Amendment proscription against cruel and unusual punishment.

The moral standard for the imposition of any punishment, including and especially capital punishment, is that those who best understand the legal, ethical and moral rules of

a society have the greatest responsibility to obey them and live within them. Yet 28 years after *Furman* and 11 years after *Penry I*, juries continue to assign the most severe penalty, and therefore the greatest culpability to those with substantially diminished cognitive ability, education and life experience. "It is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense." (*Penry I,* 492 U.S. at 328). "(F)ull consideration of evidence that mitigates against the death penalty is essential if the jury is to give a reasoned moral response to the defendant's background, character and crime." *Penry I* , quoting *Franklin v. Lynaugh,* 487 U.S. 164, 184 (1988), quoting *California v. Brown*, 479 U.S.538, 545 (1987). There can be no genuine dispute that the nullification instruction given the jury in the Petitioner's retrial prevented that jury from giving a "reasoned moral response" to Petitioner's "background, character and crime."

Johnny Penry, a man compromised by a history of horrifying daily abuse beginning in infancy and with an IQ of 54, may have had some rudimentary sense that what he did was wrong; but what is the measure of his culpability? Sorting through the world's array of murderers, a rational positioning of Penry's culpability among his felonious peers would place him near the lowest in ability to plan, to form an intent. A comparison of his capacity for cunning with others convicted of capital murder would find him among the lowest in cognitive rank. Yet Johnny Penry is a member of that minority of less than 1% of the individuals found guilty of capital murder who were sentenced to death. We would expect that small minority to be composed of the most culpable, most despicable, of felons. Instead we find many among them like Penry, persons with mental retardation, additionally scarred by the burdens of

lifelong rejection, neglect and abuse. Their failures are not theirs alone; they are the failures of society. Johnny Paul Penry is an exemplar of that minority, a man the system of human services, and then the criminal justice system, tragically failed.

Justice Potter Stewart foreshadowed Penry's tragic fate in his opinion in *Furman*, when he wrote "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.... [He is] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed."

Amici urge this Court to accept certiorari so that the important issues raised in Petitioner's case may receive a full and fair hearing, and the constitutional and just treatment this Court ordered the State of Texas to provide in his retrial may at long last be accorded him.

II. ARGUMENT

A. ALL MENTAL RETARDATION IS A SEVERE COGNITIVE DISABILITY WHOSE ESSENTIAL NATURE IS DIRECTLY RELEVANT TO THE RELIABILITY OF A DEFENDANT'S CONFESSION, HIS ABILITY TO PARTICIPATE MEANINGFULLY IN HIS DEFENSE, THE DEGREE OF CULPABILITY FOR HIS BEHAVIOR, AND THE SEVERITY OF PENALTY APPROPRIATE FOR HIS BEHAVIOR.

1. The presence of mental retardation is directly relevant to the reliability of defendant's confession.

From their first encounter with a police officer,[2] when they waive their *Fifth Amendment* rights against self-incrimination without understanding them,[3] to the final rap of the gavel as sentence is passed, the criminal justice system frequently fails persons with mental retardation who are accused of criminal conduct. Whether due to a naive tendency to provide more incriminating information about themselves than persons of normal intelligence, a greater suggestibility and vulnerability to the influence of authority figures and the pressures of interrogation, the desire to hide their disability to avoid the stigma attached to it, or an acquiescence rooted in social and cultural adaptation to their disabilities, it is well-documented that persons with mental retardation are more likely than those of normal intelligence to give unreliable, invalid confessions, frequently and alarmingly confessing to crimes they did not commit.[4]

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[2] *See* Perske, R. *Thoughts on the police interrogation of individuals with mental retardation.* Mental Retardation, 32(5), 377-380 (1994).

[3] *See* Fulero, S. & Everington, C. *Assessing competency to waive Miranda rights in defendants with mental retardation.* Law and Human Behavior, 19(5), 533-543 (1995).

[4] See Edgerton, R.B. *The Cloak of Competence: Years Later.* American Journal of Mental Deficiency. 80, 485-497 (1967) ; Gudjonsson, G.H., *A new scale of interrogative suggestibility.* Personality and Individual Differences, 5, 303-314 (1984); Gudjonsson, G.H., *The relationship of intellectual skills to suggestibility, compliance, and acquiescence.* Personality and Individual Differences, 11, 227-231 (1990); Gudjonsson, G.H.. *The Psychology of Interrogations, Confessions, and Testimony.* (1992); Heal, L. & Sigelman, C., *Response Biases in Interviews of Individuals with Limited Mental Ability.* Journal of Intellectual Disability Research, 39(4), 331-340 (1995); Leo, R.A., & Ofshe, R.J. *The Consequences of false confessions: Deprivations of*

(continued...)

The vulnerability of people with mental retardation to the inherently coercive environment of police interrogation is particularly evident when they respond to "yes - no" questions. They often try to answer questions they do not understand, giving misleading and inaccurate information. This problem has been well-documented in scientific literature,[5] as well as in case law. In the case of *State v. Moore*, 364 S.E. 2d 648, 652-56 (1988) the North Carolina Supreme Court held that a series of "yes, sir" answers did not mean the same thing when spoken by a person with mental retardation as when spoken by a person of normal intelligence,[6] and in *Monroe v. United States*, 463 F.2d 1032 (5th Cir. 1972), responses of this type were found

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[4] (...continued)
liberty and miscarriages of justice in the age of psychological interrogation. Journal of Criminal Law and Criminology (1997); Kassin, S., *The Psychology of Confession Evidence.* American Psychologist, 52(3), 221-233 (1997); Sigelman, C.K., Budd, E.C., Spanhel, C.L., & Schoenrock, C.J., *When in doubt, say yes: Acquiescence in interviews with mentally retarded persons*, Mental Retardation, 19; 53-58 (1981); Perske, R., *Thoughts on the police interrogation of individuals with mental retardation.* Mental Retardation, 32(5), 377-380 (1994). *See also Sims v. Georgia*, 389 U.S. 404 (1967); *Reck v. Pate*, 367 U.S. 433 (1961); and *Culombe v. Connecticut*, 367 U.S. 568 (1961) (mental retardation a significant factor in finding a confession was involuntary and unreliable).

[5] *See* Ellis, J. & Luckasson, R., *Mentally Retarded Criminal Defendants*, 53 Geo. Wash. L. Rev. 414, 425-428 (1985); Rosen, et al., *Investigating the Phenomenon of Acquiescence in the Handicapped: A Theoretical Model, Test Development and Normative Data*, 20 Brit. J. Mental Subnormality 58, 58-68 (1974); and Simpson, S., *Confessions and the Mentally Retarded Capital Defendant: Cheating to Lose,* Capital Defense Digest, Vol. 6, No. 2, p. 30 (1993).

[6] *See also State v. Ives*, 648 A.2d 129, 133 (Vt. 1994); *Yeatts v. Commonwealth*, 242 Va. 121, 410 S.E.2d 254, 259 (1991).

insufficient to constitute a valid waiver of rights even when the defendant's attorney was present.

2. The impact of mental retardation upon a defendant's competence taints every aspect of a criminal prosecution from the time of arrest to the imposition of the penalty imposed upon him.

Defendants with mental retardation are "often unable to understand court proceedings, assist effectively in their own defense, and/or understand the significance of their punishment. Significant impairments in expressive language, reading, and understanding verbal information; short attention span; and deficits in working memory are among the problems they experience. Assessment tools to help determine whether they are competent to stand trial primarily assess court-related vocabulary and information which may be 'parroted' without full understanding. These tests do not assess the fluid cognitive abilities which enable a person to understand their legal defense options. This is especially relevant to important decisional parts of legal proceedings as pleading guilty or not guilty, plea bargaining, weighing outcomes and consequences, and strategies used in testimony and cross examination." *Report of the Criminal Justice Task Force*, State of California, 1998, provided to the library, United States Supreme Court.

These limitations assume great importance in capital cases, looming large in cases like Petitioner's where a psychologist with the Texas Department of Criminal Justice, noting that Penry had the second lowest IQ on death row, testified that there was "considerable doubt as to whether he would comprehend what is really going on at trial." 11 SR 795.

3. Mental retardation diminishes the degree of culpability for criminal behavior.

In no case does an individual with mental retardation have that minimal level of cognitive functioning necessary for logical and moral reasoning sufficient to satisfy the requirements of the Eighth Amendment in capital cases. Although an offender with mental retardation may be aware that his behavior is unlawful, his knowledge and awareness of the degree of wrongfulness in his acts is less than that of a person of normal intelligence. Research shows, for example, that though these defendants may acknowledge that killing or other crimes are wrong, they have great difficulty in explaining *why* they are wrong. Dr. George Baroff relates the attempted explanation by a defendant with mental retardation who, while acknowledging from the witness stand that the rape of an 87-year old woman was "wrong," could not explain why. Pressed for an explanation, he admitted that he had not received "permission." Pressed further, he blurted out, "Maybe it's against her religion!" Baroff, G. *Why is Mental Retardation Mitigating?*, The Champion, Vol. XXII, No. 7, 33-35 (1998).[2] This transparent lack of understanding of the nature of criminality illustrates the impairments inherent in the very definition of mental retardation that relate directly to culpability.

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[2] *See also*, Baroff, G., *Establishing mental retardation in capital cases: A potential matter of life and death.* Mental Retardation, 29(6), 343-349 (1991); Blume, J. and Bruck, D. *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis*, Arkansas Law Review 41, 731 (1988).

4. The reduced culpability of the offender with mental retardation requires that the penalty for his acts must be less than that of a person with normal intelligence.

People with mental retardation should not be exempt from prosecution, nor should their disability be considered as a reason or excuse for criminal behavior, but the cognitive limitations which necessarily reduce their culpability require that the penalties imposed be *proportionate* in order that justice be served. The construct of culpability has a direct relationship to cognitive ability. In no case is the death penalty a proportionate punishment for a person with mental retardation. As Justice Brennan's *Penry I* dissent reasoned,

> *The impairment of a mentally retarded offender's reasoning abilities, control over impulsive behavior, and moral development in my view limits his or her culpability so that, whatever other punishment might be appropriate, the ultimate penalty of death is always and necessarily disproportionate to his or her blameworthiness and hence is unconstitutional.*" *Penry I*, 492 U.S. at 346

Since this Court's findings in *Furman*, it has been clear that the death penalty is to be reserved for the most culpable of all those convicted of capital crimes. *Zant v. Stephens* 462 U.S. 862, 877 (1983); *Woodson v. North Carolina* 428 U.S. 280, 295-296 & fn. 31 (1986); *Godfrey v. Georgia* 446 U.S. 420, 427, 433 (1980); *Lowenfield v. Phelps* 484 U.S. 231 (1988). To avoid the constitutional flaws identified in *Furman*, the states "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). Selection of individuals to receive the penalty is,

therefore, not to be based only upon the nature of the offense, but upon the nature of the offender. Less than 1% of those convicted of capital crimes are sentenced to death. It defies logic that individuals like Johnny Paul Penry, who fall into the bottom 2% of the population in cognitive abilities, in their ability to reason and plan, deserve to receive the punishment reserved for the most culpable persons elected to that minority of less than 1% who receive the harshest punishment meted out in our criminal justice system. *See The Penry Penalty: Capital Punishment and Offenders with Mental Retardation*, 23, Reed, E. (1993).

B. JOHNNY PAUL PENRY'S SENTENCE OF DEATH VIOLATES THE UNITED STATES CONSTITUTION'S GUARANTEE OF DUE PROCESS AND PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT.

1. The jury instructions used by the Court in the penalty phase of Petitioner's second trial did not meet the standard set by this Court in this case in 1989.

The Texas sentencing statute which had already been found unconstitutional by this Court in 1989 was reapplied in his second trial in a manner no less unconstitutional. The instruction fashioned by the court as a remedy failed to give the jury an opportunity to reasonably consider and apply the mitigating effect of mental retardation in flagrant disregard of this Court's order that the State must provide such an opportunity in selecting an appropriate penalty for the Defendant's behavior.

The relevance of mental retardation as a mitigating factor relates to its impact upon the defendant's culpability. In the majority opinion in *Penry I*, Justice O'Connor applied the

principles of *Lockett v. Ohio*, 438 U.S. 586 and *Eddings v. Oklahoma*, 455 U.S. 104, crystallized in *Gregg v. Georgia*, 428 U.S. 15 n.3 (1976), that, "punishment should be directly related to the personal culpability of the criminal defendant." Although she did not conclude that the time had come to ban executions of persons like Penry, her discussion of the issue of mitigation firmly married the mitigating effect of mental retardation to the concept of culpability.[8] Underlying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal culpability of the criminal defendant. As Justice O'Connor had earlier explained this concept, if the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987).

Furthermore, the jury instruction utilized by the trial court to accommodate this Court's ruling in *Penry I* was constitutionally flawed by its juxtaposition of "mental retardation" and "future dangerousness" in such a manner as to render the two concepts intertwined in the minds of the jurors. Not only did the instruction present the jurors with an

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[8] Justice O'Connor has been consistent in her focus on blameworthiness and culpability in the capital sentencing calculus. In her dissent in *Enmund* she argued that "proportionality requires a nexus between the punishment imposed and the defendant's blameworthiness." *Enmund v. Florida, 458 U.S. 782, 825 (1982).* In *Tison* she wrote that "the heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison v. Arizona, 481 U.S. 137, 149 (1987).*

insurmountable and unconstitutional nullification problem, requiring that they violate their oaths and render untruthful verdicts in order to give effect to the mitigating evidence of Penry's mental retardation, poverty, and abuse as a child; but the instruction inextricably linked those mitigating factors with the aggravating one of future dangerousness.

2. The execution of a person with mental retardation is proscribed by the Eighth Amendment as "cruel and unusual punishment" in light of the societal consensus that has evolved since this Court's opinion in this case.

More than 90 years ago, this Court recognized that the constitutional prohibition against cruel and unusual punishments is not a rigid rule, fossilized in its meaning. It "may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States* 217 U.S. 349, 378 (1910). In *Penry v. Lynaugh*, 492 U.S. 302 (1989), this Court again acknowledged the role of societal consensus in determining whether or not a particular criminal penalty is "cruel and unusual." The Court cited *Ford v. Wainwright*, 477 U.S. at 408 (1986) as a case in which the standard was met and possibly exceeded in cases of insanity; but found that the required level of societal consensus had not yet been met in cases of mental retardation. At that time only one state had banned the execution of persons with mental retardation, and the majority of the Court was not persuaded by the opinion polls and resolutions by public interest organizations presented as evidence of such a consensus. The Court noted:

> *The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely. But at present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment. Penry I* at 335.

In reaching this conclusion, the Court acknowledged that the Eighth Amendment might prohibit executing persons with profound or severe retardation, reasoning that people whose disability is of such severity are generally excused from criminal responsibility through the defense of insanity (*Penry I* at 305) and there was "more evidence of a national consensus" opposing the execution of persons with mental illness (insanity). The Court thus acknowledged that executing people with profound and severe mental retardation might be "cruel and unusual punishment". *Penry*'s holding could have been reconciled with that acknowledgment, either by drawing the constitutional line explicitly in terms of *degrees* of mental retardation or by attempting to assimilate profound or severe mental retardation into the concept of "insanity."

Neither of these methods of preserving the *Penry I* Court's reading of the application of "evolving standards of decency" (*Trop v. Dulles*, 356 U.S. 86, 101 (1958), *Coker v. Georgia*, 433 U.S. 584 (1977) has been a part of the evolution in case law or societal consensus in the decade since *Penry I*. To the contrary, both within the United States and globally, the unmistakable movement has been to add to the preexisting prohibition against executing persons found to be insane, a prohibition against executing persons with mental retardation, including all people with mental retardation within that classification, rather than to create a singular subclass of those with the most severe mental retardation. In short, the consensus that has emerged since *Penry I* has reflected a growing acceptance of persons with mental retardation in the mainstream of society, in concert with an understanding that

execution of that small minority of persons with mental retardation who commit capital crimes is archaic, barbaric and cruel.

A decade ago, four Supreme Court Justices thought a societal consensus already supported a ban on executing persons with mental retardation. Since then, lower courts have acknowledged the significance of a societal consensus in analyzing Eighth Amendment challenges to the execution of persons with mental retardation (*See* e.g., *Andrews v. Collins*, 21 F.3d 612, 632(5th Cir. 1994). The *Andrews* court found insufficient evidence at that time of a national consensus to override this Court's determination in *Penry I,* citing only three states that had prohibited such executions since this Court's opinion in 1989. Since that time the situation has changed dramatically. Ten more states have passed legislation banning these executions,[9/] bringing the number of states in which an individual with mental retardation cannot be sentenced to death to 26, including the twelve states and the District of Columbia which have statutorily eliminated the death penalty in its entirety.

The emergence of a consensus is also evident by the de facto exemption in ten states where no one or very few persons,

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9/ Ark. Code Ann. §§ 5-4-618(b) (Michie 1993); Colo. Rev. Stat. §§ 16-9-403 (Supp. 1994); Ga. Code Ann. §§ 17-7-131(j) (1990 & Supp. 1994); Ind. Code Ann. §§ 35-36-9-6 (West Supp. 1994); Kan. Stat. Ann. §§ 21-4623 (d) (Supp. 1994); Ky. Rev. Stat. Ann. §§ 532.140 (Michie 1990); Md. Code Ann. Art. 27, §§ 412(g)(1) (1992); Neb. Rev. Stat. §§ 28-105.01(2) (1997); N.M. Stat. Ann. §§ 31-20A-2.1(B) (Michie 1994); N.Y. Crim. Proc. Law §§ 400.27(12) (1995); S.D. Session Law 2000, Ch. 112 (S.D.C.L. §23A-27A-2000); Tenn. Code Ann. §§ 39-13-203(b) (1991 & Supp. 1994); Wash. Rev. Code Ann. §§ 10.95.040(2) (West Supp. 1995).

none of whom has been known to have mental retardation, has been sentenced to death since 1976.[10/] In addition, the statutory provisions in states like Connecticut which do not explicitly refer to "mental retardation," use the same concept, e.g., "The court shall not impose the sentence of death on the defendant if . . . at the time of the offense . . . his mental capacity was significantly impaired or his ability to conform his conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution." (Conn. Gen. Stat. §§ 53a-46a(g) (1997)).

The Federal law already prohibits the execution of persons with mental retardation convicted of Federal crimes (The *Federal Death Penalty Act,* 18 U.S.C. § 3596(c)(1994)). This law states that "a sentence of death shall not be carried out on a person who is mentally retarded." In and of itself, this legislation, enacted by the elected representatives of the entire country, demonstrate an evolving national consensus against execution of persons with mental retardation.

Even absent clear statutory mandates, courts have overturned or modified death sentences because the defendant

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10/ Three states, New Jersey, Connecticut, and New Hampshire, have not executed a single person since 1976. New Jersey's last execution was in 1963, Connecticut's was in 1960, and New Hampshire's was in 1939. Idaho, Ohio and Wyoming have each executed only one person since 1976. Montana and Oregon have each executed only two people since 1976. Pennsylvania has executed only three people since 1976. Mississippi has executed only four people since 1976, the most recent of which was in 1989, the year of *Penry I.* None of the 14 people executed by these ten states in the last 24 years was known to be mentally retarded (Denis Keyes, et al., *People with Mental Retardation are Dying, Legally,* 35:1 Mental Retardation 59 (1997).)

has mental retardation.[11/] Opinion polls throughout the nation continue to show that the American people are strongly opposed to executing persons with mental retardation, even in states where the death penalty has the greatest public support.

In 1989 and 1997 the American Bar Association (ABA) adopted a policy opposing the execution of people with mental retardation. In 1987 The ABA published *Criminal Justice Mental Health Standards* opposing the execution of people with mental retardation and mental illness. The American Association on Mental Retardation (AAMR)], the oldest and largest professional organization in the field, has opposed the execution of people with mental retardation since at least 1988, *AAMR Resolution on Mental Retardation and the Death Penalty*, Board Book (1988), 14. The Arc of the United States published its first resolution opposing execution of persons with mental retardation in 1985, *The Application of the Death Penalty to Offenders with Mental Retardation,* and has also incorporated a policy statement on exempting people with mental retardation from the death penalty in its position statement, *Access to Justice and Fair Treatment under the Criminal Law* adopted by the Delegate Body in October, 1998. (The Arc of the United States, 1998). This policy statement provides that the "presence of mental retardation by definition raises so many possibilities of miscommunication, misinformation, and an inadequate defense that the imposition of the death penalty is unacceptable." These positions mirror ones adopted by every other organization that has joined in this brief as an amicus curiae. Organizations in this country and around the globe with the greatest familiarity with people with

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11/ *See, e.g., Hadley v. Alabama*, 575 So.2d 145 (Ala.Crim. App. 1990); *Arizona v. Jimenez*, 799 P.2d 785 (Ariz. 1990); *Brown v. Florida*, 526 So.2d 903 (Fla. 1988), *cert. denied*, 488 U.S. 944, 109 S.Ct. 371, 102 L.Ed.2d 361 (1988).

mental retardation, the greatest credibility as to their needs and limitations, have forcefully condemned the practice of executing individuals with mental retardation through policy statements and resolutions. Today they repeat their condemnation of this barbaric practice through their participation as amici.

In addition to these measures of a national societal consensus, standards under international law as well as practices of other nations (*Thompson v. Oklahoma*, 487 U.S. 815, 831 (1988); *Enmund v. Florida,* 458 U.S. 782 (1982) merit this Court's attention. This Court has previously respected such international norms, considering the practices of "civilized nations of the world," and a U.N. survey in analyzing what constitutes "cruel and unusual punishment. (*Trop v. Dulles*, 356 U.S. 86, 104 (1957)). Justice Brennan noted the importance of international norms in his dissent in *Stanford v. Kentucky*, 492 U.S. 361, 384 (1989), where he wrote, "the choices of governments elsewhere in the world also merit our attention as indicators whether a punishment is acceptable in a civilized society." Further evidence of consensus in the international community that execution of persons with mental retardation constitutes "cruel and unusual punishment" is discussed in Section C,1, below.

In 1988, one year before *Penry I*, this Court ruled that execution of a person under the age of 16 was unconstitutionally cruel and unusual punishment, finding a national consensus against the execution of juveniles under 16 at a time when 14 states had rejected capital punishment completely, and another 17 had expressly set a minimum age for capital punishment at 16 or above (*Thompson v. Oklahoma*, 487 U.S. 815 (1988)). The remaining 19 states and the federal government did allow for such executions. Societal consensus does not connote universal agreement. There is at this point in

time more than sufficient evidence of a national consensus against the execution of persons with mental retardation to warrant ruling that these executions violate the Eighth Amendment.

3. The execution of a person with mental retardation is "cruel and unusual punishment" because it fails to effectuate either of the two penological goals which underpin and justify the imposition of the death penalty, namely, retribution and deterrence. *Gregg v. Georgia*, 428 U.S. 153, 182-83, 96 S.Ct. 2909, 2929-30, 49 L.Ed.2d 859 (1976).

Deprivation of life is the ultimate deprivation of liberty, so the standard for its application must be very high. The social purpose must be the highest; and the strategy, executions of persons with mental retardation, must be successful in achieving the purpose. Baroff, G., (1991), *supra*. Effectuating retribution requires that the penalty imposed "be directly related to the personal culpability of the criminal offender." *(Tison v. Arizona*, 481 U.S. 137, 149,107 S.Ct. 1676, 1683, 95 L.Ed.2d 127 (1987)). This cannot be the case among persons with mental retardation, in whom, "reduced ability is found in every dimension of the individual's functioning, including his language, communication, memory, attention, ability to control impulsivity, moral development, self-concept, self-perception, suggestibility, knowledge of basic information, and general motivation." (*Penry I*, 492 U.S. at 345, 109 S.Ct. at 2961 (Justice Brennan dissenting).

These same limitations render any deterrent effect of the penalty upon persons with mental retardation highly improbable. Accounts of the behavior and remarks of individuals with mental retardation on the date of their execution are replete with evidence that they are unable to

comprehend the meaning of the penalty even as applied to themselves, much less to be deterred by its imposition on another. Morris Mason asked two of his visitors to tell another death row inmate, "When I get back, I'm gonna show him I can play basketball as good as he can." *Executing mentally impaired prisoners is unjust and cruel*, Sunday Dallas Morning News (November 22, 1998). Rickey Ray Rector asked guards to set aside his piece of pecan pie so he could eat it after his execution. *Ibid.* Indeed, executing persons with mental retardation "is . . . nothing more than the purposeless and needless imposition of pain and suffering." *Thompson*, 487 U.S. at 838, 108 S.Ct. at 2700.

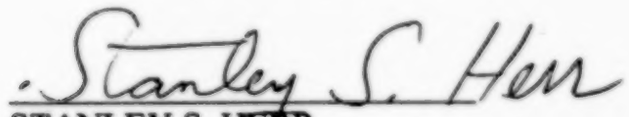
C. PETITIONER'S SENTENCE OF DEATH VIOLATES INTERNATIONAL LAW

It is an accepted principle that international law is part of our law. *The Paquete Habana*, 175 U.S. 677, 700 (1900). International treaties, United Nations resolutions and reports, and customary norms universally condemn the execution of persons with mental retardation. Edwards, W., *Execution of People with Mental Retardation: A Violation of National and Customary International Law*, Mental Retardation (April 2000) and *The Question of the Death Penalty*, U.N. ESCOR, E/CN.4/RES/2000/65). The only State other than the United States that is reported to execute persons with mental retardation is Kyrgyzstan (United Nations, *Report of the Special Rapporteur, On Extrajudicial Summary or Arbitrary Executions*, U.N. Doc.E/CN.r/1997/60 (1996) paragraphs 89, 90). Abolition of the death penalty for people with mental retardation is clearly an emerging norm of national and international law. This is the time for this Court to revisit the constitutional value judgment it made eleven years ago in light of this new evidence of a national and global consensus.

III. CONCLUSION

For the foregoing reasons, the Amici respectfully urge that this Court grant certiorari in this case and provide an opportunity for full and fair review of the grave and unique issues it presents.

Respectfully submitted,



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No. 00-6677

IN THE SUPREME COURT OF THE UNITED STATES

JOHNNY PAUL PENRY
Petitioner
v.
GARY L. JOHNSON
Director, Texas Department of Criminal Justice,
Institutional Division
Respondent

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF AMICUS CURIAE OF THE BAR HUMAN RIGHTS COMMITTEE OF ENGLAND AND WALES AND "AMICUS" IN SUPPORT OF THE PETITIONER

TO BE REPRINTED

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Interest of Amicus Curiae

The Bar Human Rights Committee is the international human rights arm of the Bar of England and Wales. The Committee regularly appears in cases where there are matters of human rights concern, and has experience of legal systems throughout the world. The BHRC has previously appeared as *Amicus Curiae* before the United States Supreme Court.

"Amicus" is a United Kingdom Charity, which aims to train lawyers in the United Kingdom to provide assistance for United States death penalty attorneys by undertaking internships, in the provision of briefs of *Amicus Curiae*, preparing clemency petitions, undertaking research and making applications to the Inter American Commission of Human Rights. "Amicus" runs an educational programme which has included senior judges, academics and practitioners from the US and around the world. "Amicus" has also previously appeared as *Amicus Curiae* before the United States Supreme Court.

The Bar Human Rights Committee of England and Wales and "Amicus" submit this *Amicus Curiae* brief in support of the Petitioner Johnny Paul Penry in seeking a writ of certiorari to the United States Court of Appeals for the Fifth Circuit, reversing the judgement of that court denying the petitioner a certificate of appealability.

Summary of Argument

The Common Law has always prevented the execution of those suffering from mental illness, a prohibition which has been followed in the United States. The reasons given for not allowing such executions are essentially summarised in the suggestion that it is against common humanity to allow the execution of someone who cannot fully comprehend the nature of their crime and the finality of the punishment. In other Common Law jurisdictions, the law developed to prevent the execution of those suffering from severe mental retardation, short of illness. In the United States, many of the States have similarly introduced legislation preventing such executions, reflecting that development in the law.

Someone with severe mental retardation has the functional ability of a juvenile. Every other common law jurisdiction around the world has prohibited the execution of juveniles. To execute someone with the intellectual development of a 7 year old would be the same as executing someone who was actually 7 years old. Evolving standards of decency would suggest that such executions are no longer permitted.

Furthermore, for someone with mental retardation to remain on death row for over 20 years awaiting punishment has similarly been held around the world to amount to inhumane treatment.

International Law, both through International Treaties and Customary International Law, has reflected these standards which are applied in every other civilised country in the world, and has evolved so as to prohibit the lawful homicide of both juveniles and the mentally retarded, and

those held for years on death row. The United States is bound by this law, and it should be applied.

If the execution of the mentally retarded is to be permitted, then the jury must be allowed to consider all these factors in considering sentence.

1. The common law, the practice of other nations, and international law are proper considerations with which to assess evolving standards of decency.

To ascertain the meaning of the constitutional bar on cruel and inhuman punishment, it is permissible to look to other jurisdictions. "'There is no doubt' that Section 10 of the English Bill of Rights of 1689 'is the antecedent' of the cruel and unusual punishment clause of our Eighth Amendment."[1] The historical evolution of common law is a factor that can be used to assist the Court: *Ford v. Wainwright*, 477 U.S. 399, 406 (1986). The influence of the international custom of Western European countries, countries with an Anglo-American culture and human rights treaties, have all been recognised as of significance. *Thompson v. Oklahoma*, 487 U.S. 815, 830 (1988). The Supreme Court has held that the practice in other "civilized nations of the world" is a relevant consideration, *Trop v. Dulles*, 356 U.S. 86 (1958), as are standards under international law, *Enmund v. Florida*, 458 U.S. 782 (1982), in deciding what amounts to "cruel and unusual punishment." Similarly, "[T]he customary law of human rights is part of the law of the United States to be applied as such by state as well as federal courts." Restatement (Third) of Foreign Relations Law of the United States, § 702, comment c.

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[1] *McKenzie v. Day*, 57 F.3d 1461, 1487 n.18 (9th Cir. 1995) (Norris, J., dissenting), citing *Harmelin v. Michigan*, 501 U.S. 957, 966 (1991) (Scalia, J., concurring).

These concepts should therefore be used in order to assist the Court in deciding whether executing a mentally retarded man with the intelligence of a 7 year old after 20 years on death row amounts to cruel and unusual punishment:

> "[T]he basic concept underlying the [Eighth Amendment prohibition of cruel and unusual punishment] is nothing less than the dignity of man. While the state has power to punish, the [clause] stands to assure that this power be exercised within the limits of civilized standards," and recognizes the "evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958).

Similar concepts exist in the other common law jurisdictions. In the case of *Fisher v. Minister of Public Safety and Immigration (No. 1)*, [1998] A.C. 673, at 686, Lord Steyn commented that:

> "The innate capacity of different areas of law to develop varies. Thus the law of conveyancing is singularly impervious to change. But constitutional law governing the unnecessary and avoidable prolongation of the agony of a man sentenced to die by hanging is at the other extreme. The law governing such cases is in transition."

The European Court of Human Rights refers to the European Convention of Human Rights as being a "living instrument" when considering the prohibition on inhuman or degrading treatment or punishment in Article 3. *Soering v. United Kingdom*, Judgment of 7 July 1989, Series A, No. 161, 11 EHRR 439.

2. The execution of those with serious mental disturbance has always been prevented by the common law.

From earliest times the Common Law prevented the execution of those suffering from mental disturbance. As the lawyer Coke stated, "By intendment of Law the execution of the offender is for example, . . . but so it is not when a mad man is executed, but should be a miserable spectacle, both against Law, and of extream inhumanity and cruelty, and can be no example to others."[2] Similarly, Blackstone stated in the *Commentaries on the Laws of England*, that "Idiots and lunatics are not chargeable for their own acts, if committed when under these incapacities." *Ford v. Wainwright*, 477 U.S. at 406. This interpretation of the law was accepted in that case by the Supreme Court for the following reasons, as stated by Justice Marshall:

> "It is clear that the ancient and humane limitation upon the State's ability to execute its sentences has as firm a hold upon the jurisprudence of today as it had centuries ago in England. The various reasons put forth in support of the common-law restriction have no less logical, moral and practical force than they did when first voiced. For today, no less than before, we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life.... Similarly, the natural abhorrence civilized societies feel at killing

[2] 3rd Institute 6 (6th ed. 1680), cited in *Ford v. Wainwright*, 477 U.S. 399, 407.

> one who has no capacity to come to grips with his own conscience or deity is still vivid today. And the intuition that such an execution simply offends humanity is evidently shared across this nation. Faced with such widespread evidence of a restriction upon sovereign power, this Court is compelled to conclude that the Eighth Amendment prohibits a State from carrying out a sentence of death upon a prisoner who is insane. Whether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment." *Id.* at *408.*

In the United Kingdom, the practice developed with regard to those suffering from mental deficiency not actually amounting to a disease, so as not to impose the death penalty upon them. Judges in the eighteenth century could force the King to give mercy by refusing to *pronounce* the death sentence, merely *recording* it. For example, in the trial of Hadfield for attempting to kill King George III in 1800, the great lawyer Erskine successfully persuaded the judge, Lord Kenyon, that suffering from delusions was sufficient to acquit the defendant as insane, even though there was no total deprivation of understanding. *Hadfield's Case*, 27 St. Tr. 1281 (1800). By the nineteenth century in the United Kingdom, the law had developed with the introduction of the rule in *M'Naghtens' Case*, 10 Cl. & F. 200 (1843), which held that where, "at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or if he did know it, that he did no know he was doing what was wrong." By the late

nineteenth century, 21% of defendants had their death sentences reprieved due to insanity, or "mental disturbance." By the early twentieth century this had become one third.[3]

Parliament appointed a Royal Commission on Capital Punishment in 1949: Command Paper 8932. In considering this issue they reported that a "mental defective…is a person who has never possessed a normal degree of intellectual capacity, whereas in an insane person faculties which were originally normal have been impaired by mental disease." Para. 336. Such "mental deficients" included those with IQ's up to 70. The Commission found that "there seems to be no doubt that in practice the M'Naghten Rules have often been so interpreted as to include mental deficiency, at least in cases where the other conditions laid down by the rules are fulfilled." Para. 362. They concluded that:

> "[T]hough some mental defectives can properly be held wholly irresponsible, the majority should rather be regarded as having a diminished responsibility. The diminution of responsibility may in borderline cases be relatively small, but it can never be excluded, and in our opinion it would not ever be right to carry out the sentence of death in any case where a prisoner is certifiable as a mental defective" (para. 385).

In 1954, Derek Bentley was executed for the murder of a policeman. Although he was in police custody at the time the gunman shot, it was found that his words "Let him have it, Chris," amounted to an encouragement of the other person to

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3 *See* Radzinowicz, L. & Hood, R., *The Emergence of Penal Policy, in* 5 A History of English Criminal Law and Its Administration from 1750, at 264-65 (1986).

shoot. "Chris" was only 16 years old and could not be executed. Bentley only had an IQ in the low seventies, "just above the level of a feebleminded person" and a mental age of 11½. *R. v. Home Secretary ex parte Derek Bentley*, [1994] QB 349. The Home Secretary did not commute the sentence, although the trial judge, Lord Chief Justice Goddard, had expected him to do so. There was public outcry when he was executed.

Following the report of the Royal Commission and the case of Derek Bentley, Parliament introduced the Homicide Act 1957, section 2 of which provides that:

> "Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing."

The Royal Commission had concluded that:

> "There can be no doubt that, in the feeble-minded, judgement, moral sense and appreciation of right and wrong are defective, and the power of self-control is substantially less than that of a normal person: and this defect, although it may vary in degree, is liable to be accentuated by such factors as drink or a transient phase of unrest. There may be cases in which these defects of intellect and of self-control are so great as to justify those affected

by them being held wholly irresponsible. On the whole, however, medical witnesses appeared to consider that, save in exceptional cases, the feeble-minded should be regarded as having diminished responsibility rather than as being wholly irresponsible, and we accept this view." Para. 348.

Consequently, the common law in the United Kingdom developed in the mid-twentieth century so as to prevent the execution of those suffering from mental retardation, as it was not thought that such people had complete responsibility for their actions.

3. The execution of the mentally deficient equates with the execution of juveniles, which is prohibited in all other common law countries.

In 1949, The Royal Commission also considered the issue of comparing actual ages with mental ages, hearing evidence that "the feeble-minded [have] a mental age of 6-10½ or 11 years, or an I.Q. of 40-70," para. 338. They considered that:

> "An adult mental defective with a mental age of 9 years differs in important respects from a normal child of 9, notably in sexual and emotional development: and it is just this difference which may lead to the commission of crime. The adult will be in some ways more mature and may have learned a simple trade and be able to earn a living, but he is exposed to much more violent and dangerous temptations.... When the instincts and emotions of an adult are combined with the insight and understanding of a child, it is

> inevitable that the power to control those instincts should be defective, and should on occasions fail altogether, with results sometimes disastrous." At para. 339.

That comment appears particularly apposite in the case of Johnny Paul Penry, where it is clear that the authorities were aware from previous incidents that he had difficulty controlling adult emotions and instincts within the mind of a child.

The European Court of Human Rights has also made the correlation between mental deficiency and youth in the death penalty in the case of *Soering v. United Kingdom*, Judgment of 7 July 1989, Series A, No. 161 at para. 108, 11 E.H.R.R. 439, 509, where it stated that:

> "The youth of the person concerned is a circumstance which is liable, with others, to put in question the compatibility with Article 3 [inhuman or degrading treatment] of measures connected with a death sentence. It is line with the Court's case-law ... to treat disturbed mental health as having the same effect for the application of Article 3."

Historically, the common law always prevented the execution of those too young to fully comprehend their actions. Executions were rarely used against those 16 or younger in the eighteenth century, and the last of a 17 year old in the United Kingdom was that of Joseph Morley in 1887. In this century, there have only been three executions of people aged 18-21, in 1904, 1922 and 1925. The Atkin Committee on Capital Punishment recommended in 1930 that the age below which defendants could not be executed be raised to 21. They referred to the fact that: "[T]he emotional

balance of young people under the age of 21 is unstable, and this instability reduces their responsibility, and that the instability of adolescents, which in some cases may even amount to a form of mental disorder is very often a factor in the crime." Para. 189. Parliament introduced the Children and Young Person's Act in 1933 which raised the age to 18.

The United States has to some extent followed the development of the common law in this way, by preventing the execution of those under 16 at the time of the offence, *Thompson v. Oklahoma*, 487 U.S. 815 (1988), but it is clear that other common law countries have moved further in developing standards of common decency.

4. Detention of a person who is mentally retarded on death row for over 20 years amounts to inhuman punishment according to the common law and international law.

Historically, executions in England followed swiftly after sentence was passed, normally within 4 weeks. By the mid 1950's, the Royal Commission on Capital Punishment reported an average delay as six weeks where there was an appeal, and three weeks if there as not. As an example, in 1947 there was great public outcry following the discovery that certain men convicted of capital murder in the Gold Coast had been on death row for two years. In a debate on the matter in the House of Commons, Mr. Winston Churchill expressed the sentiment of the House when he said: "people ought not to be brought up to execution, or believe that they are to be executed, time after time whether innocent or guilty,

however it may be, whatever their crime. That is a wrong thing."[4]

The situation was the same in the United States at the time of the War of Independence. Delays of years were not known, as Justice Stevens noted in his memorandum, in the case of *Lackey v. Texas*, 514 U.S. 1045 (1995), where there was a delay of 17 years. "Such a delay, if it ever occurred, certainly would have been rare in 1789, and thus the practice of the Framers would not justify a denial of the petitioner's claims."

In the case of *Pratt and another*, cited above, the Judicial Committee of the Privy Council held that holding someone on death row for 14 years amounted to inhuman or degrading punishment in violation of Section 17(1) of the Constitution of Jamaica. The Privy Council stated that:

> "... It is difficult to envisage any circumstances in which in England a condemned man would have been kept in prison for years awaiting execution. But if such a situation had been brought to the attention of the court their Lordships do not doubt that the judges would have stayed the execution to enable the prerogative of mercy to be exercised and the sentence commuted to one of life imprisonment." *At page 19.*

Other common law jurisdictions have decided that delays measured in years are not acceptable. The Supreme Court of Zimbabwe held that being held for between four and six years under sentence of death constituted "inhuman or

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[4] Cited in *Pratt and another v. Attorney General of Jamaica* [1994] 2 A.C. 1, at 18.

degrading punishment."[5] In India, two years delay has been held unconstitutional.[6]

The European Court of Human Rights considered the same issue in 1989 in the case of *Soering v. United Kingdom*. Soering was due to be extradited for a murder to West Virginia, where there was the possibility that he would face the death penalty, with an average wait of 7 to 8 years on death row. *Soering* argued that such treatment was in violation of the prohibition of cruel and degrading punishment in Article 3 of the European Convention of Human Rights. The Court specifically considered youth and mental health issues as a part of the death row phenomenon. It was argued that there were provisions to prevent the arbitrary application of the death penalty. The Court stated that these provisions "do not, however, remove the relevance of age and mental condition in relation to the acceptability, under Article 3, of the "death row phenomenon" for a given individual once condemned to death." (para. 109) One Federal court has referred to the case of *Soering* as being "an important precedent.... It reflects a persuasive though non-binding international standard." *Ahmad v. Wigen*, 726 F. Supp. 389, 414 (E.D.N.Y. 1989).

Clearly, those who are mentally retarded are likely to suffer more during detention than other prisoners. "Mentally retarded persons meet with unremitting hardships in prison." *Ruiz v. Estelle*, 503 F. Supp. 1265, 1344 (S.D. Tex. 1980). Consequently, incarceration on death row in such circumstances makes the case of Johnny Paul Penry different from many other examples of the death row phenomenon.

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[5] *Catholic Commission for Justice & Peace in Zimbabwe v. Attorney-General*, 14 Hum. Rts. L.J. 323 (1993).

[6] *Vatheeswaran v. State of Tamil Nadu*, 2 SCR 348 (1983).

Over a century ago the US Supreme Court recognised that, "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." *In re Medley*, 134 U.S. 160, 172 (1890). "If the Court accurately described the effect of uncertainty in Medley, which involved a period of four weeks...that description should apply with event greater force in the case of delays that last for many years." *Lackey v. Texas*, 514 U.S. 1045 (1995). In that case, the memorandum of Justice Stevens suggested that with such a novel issue, the lower courts should look into this point in detail. "Petitioner's claim, with its legal complexity and its potential for far-reaching consequences, seems an ideal example of one which would benefit from such further study." *Id.* at 1045.

5. The execution of juveniles or the mentally retarded violates international treaties and customary international law.

International agreements to which the United States is a party are laws of the United States and supreme over the law of the several states. Restatement (Third) of Foreign Relations Law of the United States § 111 (1) (1987). The United States Supreme Court has for a long time held that "[S]tate law must yield when it is inconsistent with or impairs the policy or provision of a treaty or of an international compact or agreement." *United States v. Pink*, 315 U.S. 203, 230-31 (1942).

Through treaty ratification, nations promote the growth of customary international norms. "International agreements create law for the states parties thereto and may lead to the creation of customary international law when such

agreements are intended for adherence by states generally and are in fact widely accepted." Restatement, *supra*, § 102(3).

The prohibition of executions of both juveniles and the mentally retarded has now achieved the status of a Customary Norm of International Law. Under United States law, "[T]he customary law of human rights is part of the law of the United States to be applied as such by state as well as federal courts." Restatement, *supra*, § 111 (1) (1987). For a particular norm to achieve the status of customary international law, two conditions must be met. Firstly, the norm must be reflected in a general practice by nations, and secondly, there must be *opinio juris*.

With regard to treaties, the International Covenant on Civil and Political Rights (ICCPR) was ratified by the USA in 1992. Under Article 6(5) of the ICCPR, those under 18 at the time of an offence may not be sentenced to death. The United States Senate has sought to apply a reservation allowing the execution of juveniles. Article 4(2) of the ICCPR was also ratified, which states that "no derogation from articles 6, 7, ... may be made under this provision." Eleven European signatories of the ICCPR have declared the reservation illegal, and the United Nations Human Rights Committee, which has a United States representative, has stated that the reservation is invalid[7]. Such a reservation made by the Senate violates the doctrine of separation of powers and the Treaty Clause which limits the power to make treaties to the president, and violates the "object and purpose" of the ICCPR itself. Consequently, the reservation is invalid.

[7] *Concluding Observations of the Human Rights Committee: USA*, UN Doc. CCPR/C/79/Add.50, para. 279 (October 3, 1995).

The general practice of nations can be adjudged by the fact that the United States is amongst only a handful of nations which permits the execution of juveniles, as observed by Springer, CJ, dissenting, in *Domingues v. Nevada*: "Under Nevada's interpretation of the treaty, the United States will be joining hands with such countries as Iran, Iraq, Bangladesh, Nigeria and Pakistan in approving death sentences for children." 961 P.2d at 1280-81. According to recent figures, in 1998 only one country actually executed a defendant who was a juvenile at the time of the offence, that country being the United States. Amnesty International, *The Death Penalty Worldwide: Developments in 1998*, ACT 50/04/99 (May 1999). In two other countries where sentences of death were imposed, Singapore and the Democratic Republic of Congo, the sentences were commuted to life imprisonment.

Similarly, no democratic country has been reported as executing a person suffering from mental retardation, save for one unconfirmed report in Japan suggesting "mental illness." Amnesty International Japan, *The Death Penalty: Summary of Concerns*, ASA 22/01/97 (March 1997). The recent report by the Secretary General of the United Nations, *Capital Punishment, and the Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty*, UN Doc. V.00-52715(E) (2000), at paragraph 96, indicates that of the States which replied to their enquiries, only Togo stated that their law would permit the execution of both the mentally retarded and the mentally ill. The 41 members of the Council of Europe, which includes Russia and the former communist states of eastern Europe, have *de facto* abolished the death penalty since 11 March 1997.

Opinio Juris has made it clear that the execution of the mentally retarded is not accepted in international law. The United Nations Economic and Social Council made a

resolution in 1989 recommending that states eliminate the death penalty "for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution."[8] Similarly, in a recent report, the United Nations Human Rights Committee stated it "regrets that, in some cases, there appears to have been a lack of protection from the death penalty of those mentally retarded."[9] The United Nations Commission on Human Rights adopted a resolution on 27 April 2000, sponsored by the European Union, calling on retentionist countries "not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person."[10] The UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has stated that international law prohibits the capital punishment of mentally retarded or insane persons, pregnant women and mothers of young children.[11]

International tribunals have found that such executions violate international law. In the case of *Francis v. Jamaica*, Communication No. 606/1994 U.N.H.R.C., on 12 August 1994, the United Nations Human Rights Committee held that the execution of a man suffering from mental anguish, but examined and found not to be insane, together with a delay in death row of over 12 years, amounted in that case to cruel, inhuman or degrading treatment in violation of Article 7 of

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[8] *Resolution of ECOSOC*, 1989/64, adopted 24 May 1989, UN Doc. No. E/1989/INF/7.

[9] Note 8, *supra*, para. 281.

[10] *Resolution of the UN Commission on Human Rights*, adopted 27 April 2000, UN Doc. No. CN.4/RES/2000/65.

[11] *Report by the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution*, UN Doc. No. E/CN.4/1994/7 (December 7, 1993).

the ICCPR. Similarly, the European Court of Human Rights in the case of *Soering v United Kingdom*, cited above, held that:

> "Although it is not for this Court to prejudge issues of criminal responsibility and appropriate sentence, the applicant's youth at the time of the offence and his then mental state, on the psychiatric evidence as it stands, are therefore to be taken into consideration as contributory factors tending, in his case, to bring the treatment on death row within the terms of Article 3" *at para. 109.*

Consequently, it is obvious that this Court would have to allow the law of the United States to act in opposition to the rest of the world if Johnny Paul Penry is executed.

6. Where the death penalty for the mentally retarded is retained, the jury should be given sufficient instructions to allow for full consideration of mental retardation as mitigation.

The trial judge's instructions in the instant case created an insoluble dilemma for the jurors. He instructed them that they were to consider mitigating evidence only when answering the special issues questions.

> If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability *at the time you answer the special issue*. If you determine, when giving effect to the mitigating evidence, if any, that a life

> sentence, *as reflected by a negative finding to the issue under consideration*, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, *a negative finding should be given to one of the three special questions*.

This instruction was given despite the fact that much mitigation evidence in Penry's case, e.g. the evidence concerning his brutal treatment as a child, had no relevance to any of the three special issue questions. Thus, in order to consider the mitigation evidence presented, which the jury was told it must do, it had to consider such evidence in a context in which it was completely irrelevant.

In *Boyde v. California*, 494 U.S. 370 (1990), this court decided that if there was a real possibility that a juror might interpret a charge in a way that prevented them giving proper consideration or effect to mitigating evidence, the charge would not pass constitutional muster. In the instant case a reasonable and conscientious juror might well have concluded from the judge's charge and the verdict form that constitutionally relevant mitigating evidence had no relevance to the special issues presented for answer. In such circumstances, such a juror could not both hold to the oath he or she had taken and yet give effect to mitigating evidence if they wished to do. The judge effectively invited the jurors to consider disregarding part of their oath if they found it expedient to do so.

Carrollean logic of such a kind is manifestly unjust and likely to give rise to those 'freakish' or 'arbitrary' impositions of the death penalty that were condemned in *Furman v. Georgia*, 408 U.S. 238 (1972). In the case of a mentally retarded defendant like the petitioner, constitutionally relevant evidence as to his cognitive abilities

goes to the very heart of his culpability. A jury charge that obfuscates the relevance or consideration of such mitigating evidence is a denial of a defendant's entitlement to due process guaranteed by the Fifth and Fourteenth Amendments.

7. Conclusion

In 1989, the Supreme Court stated that "a national consensus against execution of the mentally retarded may someday emerge, reflecting the 'evolving standards of decency that mark the progress of a maturing society.'" *Penry v. Lynaugh*, 492 U.S. 302, 340 (1989). Clearly, there is a strong argument for stating that such a consensus has now emerged, not only amongst the individual states, but amongst the community of democratic nations. This issue, dealing with the fundamental humanity of the nation, should be properly

argued before the Courts. Consequently, counsel for *Amici Curiae* urge the Court to grant the relief sought by the Petitioner.

Respectfully Submitted,

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Supreme Court, U.S.
FILED
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No. 00-6677

In The

Supreme Court of the United States

JOHNNY PAUL PENRY,

Petitioner,

v.

GARY L. JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX
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RELEVANT DOCKET ENTRIES

(abbreviations expanded)

District Court of Polk County, Cause No. 10,222

* * *

March 27, 1990	. . . . Defendant's motion for change of venue granted; case to be transferred to Walker County. State's motion granted . . . to appoint Dr. Fasson or Dr. Quijano to examine defendant.

* * *

District Court of Walker County, Cause No. 15,977-C

* * *

July 9, 1990	. . . . Jury returned verdict; verdict guilty of capital murder. . . .

* * *

July 16, 1990	. . . . Defendant's instructions and objections heard and ruled upon . . . .
July 17, 1990	. . . . Charge read to jury. . . . Jury returned verdict. . . . Verdict of "yes" for all 3 special issues received and filed. . . . Judgment entered on verdict. Defendant remanded to custody of Sheriff of Walker County to be transported to T.D.C. pending automatic appeal of death sentence.
September 21, 1990	Defendant's motion for new trial heard and denied. . . .

May 5, 1997	Order to transfer case back to Polk County signed.

Texas Court of Criminal Appeals, Nos. 71,130 & 15,981-02

* * *

February 22, 1995	Opinion issued affirm[ing decision below].

* * *

June 7, 1995	Rehearing denied.

* * *

United States District Court for the Southern District of Texas, Civil Action No. H-97-4094

* * *

March 29, 1999	Memorandum and order granting Respondent's motion for summary judgment; denying Penry's motion to strike; denying Penry's cross-motion for summary judgment, entered.
March 29, 1999	Final judgment entered . . . . Court denies petitioner Johnny Penry's petition and denies a certificate of appealability.

* * *

August 12, 1999	Memorandum and opinion denying Penry's motion to alter and amend judgments entered.

* * *

United States Court of Appeals for the Fifth Circuit, No. 99-20868

* * *

June 20, 2000	Order filed denying motion for Certificate of Appealability.

* * *

July 25, 2000	Order filed denying petition for rehearing *en banc*, denying petition for rehearing.

* * *

CAUSE NO. 15,977-C

THE STATE OF TEXAS	§	IN THE DISTRICT COURT OF WALKER COUNTY, TEXAS
VS.	§	
JOHNNY PAUL PENRY	§	278TH DISTRICT COURT

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

The defendant, JOHNNY PAUL PENRY, stands charged by indictment with a felony offense, alleged to have been committed in Polk County, Texas on or about the 25th day of October, 1979. You have been impaneled to determine the issue of the present competency of the defendant to stand trial for such offense.

1.

Our law provides that no person shall be tried for a criminal offense while he is incompetent to stand trial. A person is incompetent to stand trial for an offense if he does not have:

(a) sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding; or

(b) a rational as well as factual understanding of the proceeding against him.

2.

The defendant shall be found competent to stand trial unless proved incompetent by a preponderance of the evidence.

By the term "preponderance of the evidence" is meant the greater weight and degree of the credible evidence in the case.

The fact that the defendant is under indictment is no evidence of present competency to stand trial, and you should not consider such fact as evidence. Neither should you, in your deliberations, consider or discuss the guilt or innocence of the defendant with respect to the offense charged against him.

You will confine your consideration and deliberations solely to the issues submitted to you.

3.

On the issue of present incompetency of the defendant you are instructed that the law requires the jury to find and state in its verdict whether the defendant is incompetent to stand trial; and, if the jury finds the defendant incompetent at the present time, then the jury shall find and state in its verdict whether there is no substantial probability that the defendant will attain the competency to stand trial within the foreseeable future.

4.

If you find by a preponderance of the evidence that the defendant does not have sufficient present ability to

consult with his lawyer with a reasonable degree of rational understanding, or does not have a rational as well as factual understanding of the proceeding against him, then you will find him incompetent to stand trial; otherwise, you will find in accordance with the instructions given you.

5.

You are the exclusive judges of the facts proved, the credibility of the witnesses, and the weight to be given their testimony, but the law you shall receive in these written instructions and be governed thereby.

After you have retired to consider your verdict, no one has any authority to communicate with you except the officer who has you in charge. During your deliberations in this case, you must not consider, discuss, nor relate any matters not in evidence before you, nor any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

After you retire to the jury room you should select one of your members as your Foreperson. It is the Foreperson's duty to preside at your deliberations, vote with you, and when you have unanimously agreed upon a verdict, to certify to your verdict by using the appropriate form which you will find attached hereto, and signing the same as Foreperson.

Bearing in mind the foregoing instructions, you will answer the special issues on the pages following, placing your answer in the spaces provided therefor.

FILED: _____

/s/ Joe Ned Dean
JUDGE PRESIDING

SPECIAL ISSUE NO. 1

Do you find by a preponderance of the evidence that the defendant, JOHNNY PAUL PENRY, is presently incompetent to stand trial for the offense charge against him?

If you find by a preponderance of the evidence that the defendant does not have sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding or that he does not have a rational as well as factual understanding of the proceeding against him, then you will find him presently incompetent to stand trial and your answer to Special Issue No. 1 will be "Yes;" otherwise, you will answer "No."

ANSWER: /s/ NO

If you have answered Special Issue No. 1 "Yes," then answer the following special issue:

SPECIAL ISSUE NO. 2

Do you find that there is no substantial probability that the defendant will attain the competency to stand

trial within the foreseeable future, you will answer the question by having the Foreperson sign his/her name as Foreperson to the first answer below. If you do not so find, you will answer the question by having the Foreperson sign his/her name as Foreperson to the second answer below:

ANSWER:

(a) We, the jury, find that there is no substantial probability that the defendant, JOHNNY PAUL PENRY, will attain the competency to stand trial within the foreseeable future.

_____
FOREPERSON

(b) We, the jury, do not find that there is no substantial probability that the defendant, JOHNNY PAUL PENRY, will attain the competency to stand trial within the foreseeable future.

_____
FOREPERSON

VERDICT

We, the jury, return in court the above answers as our answers to the special issues submitted to us, and the same is our verdict in this case.

/s/ Richard I Watkins 5/16/90
FOREPERSON

CAUSE NO. 15,977-C

IN THE DISTRICT COURT
OF WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

* * *

[15:186] talk to you about more in individual voir dire, concerning your feelings about the death penalty in general, and specifically in rape/murder cases.

Another area, in fact, that a jury can take into consideration is what we refer to loosely sometimes as mitigating evidence. There is not a separate question on mitigating evidence, but you will probably receive some sort of an instruction from the Judge, concerning mitigating evidence. Mitigating evidence, like a lot of other things, is not going to be defined to you specifically. That will be up to you to determine what you may consider mitigating or not. Maybe, basically a mitigating evidence is some sort of evidence concerning the defendant's background or past history that a juror will feel is of such a nature to lessen his blame worthiness for the particular crime he has committed, to make him less morally cupable. It may not have anything directly to do with that crime, something out of his past, but for whatever reason the juror feels, and you have got a [187] right to do this if you so elect, and with regard to any type of a mitigating evidence, if you feel like whatever that evidence is, that it warrants reducing his cupability, his responsibility, his moral responsibility for the commission of this crime, then you can take that into consideration; and furthermore, if you feel like that evidence is strong enough that

you feel like it would even warrant a lesser sentence than death, that it would warrant a life sentence instead of death, then you can answer one or more of these questions no, so that the defendant will receive a life sentence instead of the death penalty.

A couple of things about mitigating evidence. You are going to hear a lot about that, I'm sure, in individual voir dire, for one thing, what is or is not mitigating evidence is up to you. It is not what I say it is, it is not what John Wright says it is, or Randy Smith says it is, it is up to you. Nobody is going to tell you this is mitigating evidence or this is not mitigating evidence.

* * *

[SX #47 /s/ LS 7-3-90]

(CONFESSION WARNING)

Date 10-25-79
Time 3:25 PM

Statement of Johnny Paul Penry, taken at (Building) Livingston Police Department, Polk County, Texas.

On the 25th day of October, 1979, at 2:45 o'clock P.M., I, Johnny Paul Penry, was taken before G.H. Galloway, a Magistrate at the Livingston Police Department Polk County, Texas, who informed me:

Of the accusations made against me;
That I had a right to retain counsel; [/s/ JP]
That I had a right to remain silent;
That I had a right to have an attorney present during my interview with peace officers or attorneys representing the state;
That I have a right to terminate an interview at any time;
That I have a right to request appointment of counsel if I cannot afford counsel;
That I have a right to an examining trial;
That I am not required to make any statement, and any statement I make may be used against me.

I have now been warned by W.F. Smith –
the person to whom I am making this statement, and was so warned by
W. F. Smith prior to any questioning of me by Peace Officers while I was under arrest: (1) that I have the right to have a lawyer present to advise me either prior to any questioning or during my questioning; (2) that if I am unable to employ a lawyer I have the right to have a

lawyer appointed to counsel with me prior to or during any questioning, and (3) I have the right to remain silent and not make any statement at all and that any statement I make may and probably will be used in evidence against me at my trial; and (4) I have the right to terminate the interview at any time. and (5) that any statement I make may be used as evidence against me in court.

I do not want to consult with a lawyer before I make this statement, and I do not want to remain silent, and I now freely and voluntarily waive my right to a lawyer and to remain silent and make the following voluntary statement:

My name is Johnny Paul Penry and I am 23 years of age; [/s/ J.P.] I was born in Lawton, Oklahoma and at present I consider the [/s/ J.P.] following address my home 302 Orr Dr. Livingston, Texas [/s/ J.P.]

About 3 weeks ago a guy named Harold came out to my Aunt Evelyn's and wanted me to help him move some heavy stuff. I left with him and we went to a house out of Livingston and turned on the electricity. We came back to Livingston to his business and loaded a stove and freezer up on a pickup. We carried it to a house behind where they work and the school buses. This is the house where I saw this chick that I stabbed today. It was her house. Another older woman was with her. I think it was her neighbor. We unloaded the stuff and had to go to Reuters and get a pipe for the stove. We went back and fixed the stove. The chick that I stabbed said the freezer didn't work so me and Harold went back to the shop and got a part and then fixed the freezer. After we fixed the freezer we went to another house right behind there in the back

yard and worked on another stove. We boogied back to town and about an hour later we went back to this chicks house to get Harold's money for the stove and freezer. No one was home so we went on back and did some more work. My Aunt came and got me for a Doctor's appointment. While we were at the Chick's house nothing out of the ordinary happened. I didn't see her again until today. [/s/ J.P.]

WITNESS: /s/ [Illegible]
/s/ [Illegible]
/s/ Johnny P. Penry

[/s/ J.P.]

[/s/ J.P.] I got up this morning and was messing around town. I saw this other girl and she looked pretty good. This made me think about this Chick I stabbed. I decided I would try to go over and get me a piece. I'm not sure, but I'd say it was about 8 o'clock or a little after. So I went over to her house and circled around the block to see if her husband was there. I took my pocket knife out and opened it and stuck it back in my pocket. I saw a pickup so I went up to the kitchen door and knocked to see if he was there. She came to the door and opened the wooden door and pushed the screen open a little ways. I asked her if her husband was there and she said no. Then I asked her if I could see her stove and she said, "What for?" I said I was going to fix the stove and she said, "What for, it's working?" She told me, "You better get out of here." That's when I jerked the screen door open, pulled my knife out and grabbed her. I pushed her back in the kitchen. She was screaming and hollering for help,

and knocked the knife out of my hand. We fought in the kitchen a little bit. I slapped her in the face about once. I gōt her down on the floor and she said she was dizzy. I let her up but I held onto her. I looked out the door to see if anybody was coming. I kind of turned by back but I still had a hold of her. She picked up some scissors that had some orange handles. They were pretty big and looked like cutting scissors.

She stabbed me in the back. I wrestled with her and took the scissors away from her. Then I started dragging her into the bedroom and she told her dog to bite me. He started trying to bite me and I kicked him in the throat and he landed under the bed. I don't know what happened to the dog after that. She was laying on her back in the floor and I was standing up. She said she wouldn't take her clothes off. I kicked her in the left side with my boots. She said just wait she'd take her clothes off. She sat up and pulled her pants down past her knees. I unzipped my pants and started to get on her. She got away from me and got up. The scissors were on the bedroom floor. I had dropped them there. She started for them and I kicked them out of her hand. I pushed her down to the floor and started to get on her again. I told her I'd kill her if she didn't make love to me. I hit her about 2 times in the chest and she said "O.K." she would. I went on and fucked her on the bedroom floor and then after I got through I got up and walked over to the kitchen door where the scissors had landed and picked them up. I walked back to her and got down on her. I sat down on her stomach and I told her that I loved her and hated to kill her but I had to so she wouldn't squeal on me. She didn't say anything and I stabbed her with the scissors.

She leaned forward and pulled the scissors out of [/s/ J.P.] herself as I was getting up. I then ran out the door and boogied.

I went home and took my shirt and sweat shirt off and threw them out where the washing machine is. I put another shirt on and went next door to see if I could get some bandaids. Sharon doctored my back and I went home. A good while later a cop I know as Billy came by and said a girl had been raped and stabbed. He asked me if I knew anything about it and I said "No" He asked me about the cuts on my back and I told him I fell on a stick. Billy asked me if I would mind going with him and I said O.K. A little later I told some Officers that they could search my house. I showed them my shirt and sweat shirt.

We then went to the Chick's house that I stabbed. I stayed outside in the car. After a while I started worrying about it and I told him I was going to be honest with him and tell the truth. A deputy there read me my rights and I told them what happened. A little later I went before Judge Galloway and he read my rights to me and my father and mother came up about that time. My father read me my rights again from the paper. He asked me if I did it and I said I did and he and my mother left. I then told Chief Smith and the D. A. that I would give them a written statement about everything I did.

I cannot read or write but this statement was read to me before I signed it. [/s/ JP]

This statement was read to me by Joe Price. [/s/ JP]

I have read this statement consisting of 2 page (s), each of which bears my signature, and I affirm that all the facts and statements contained herein are true and correct. I further affirm that I knowingly, intelligently and voluntarily waived the above rights prior to and during the making of this statement. [/s/ J-P]

Witness my hand this the 25th day of October, A.D. 1979, at 6:05 p.m.

WITNESS: /s/ [Illegible]

WITNESS: /s/ [Illegible]

/s/ Johnny P. Penry
Signature of person making statement

[SX #48 /s/ LS 7-2-90]

(CONFESSION WARNING)

Date 10-26-79
Time 10:40 AM [/s/ J-P]

[/s/ J-P] Statement of Johnny Paul Penry, taken at Livingston Police Department, Livingston, Polk County, Texas.

[/s/ J-P] On the 25th day of October, 1979, at 2:45 o'clock PM, I, Johnny Paul Penry was taken before Judge G. H. Galloway, at the Livingston Police Department, a magistrate in Polk County, Texas, who informed me: (1) Of the accusations made against me and of the sworn complaint filed therewith; (2) That I had a right to retain

counsel; (3) That I had a right to remain silent; (4) That I had a right to have an attorney present during my interview with peace officers or attorneys representing the state; (5) That I have a right to terminate an interview at any time; (6) That I have a right to request appointment of counsel if I cannot afford counsel; (7) That I have a right to an examing trial; (8) That I am not required to make any statement, and any statement I make may be used against me. [/s/ J-P]

[/s/ J-P] I have now been warned by Maurice C. Cook, the person to whom I am making this statement, and was so warned by Maurice C. Cook prior to any questioning of me by peace Officers while I was under arrest; (1) I have the right to remain silent and not make any statement at all and that any statement I make may be used against me at my trial; (2) Any statement I make may be used as evidence against me in court; (3) I have the right to have a lawyer present to advise me prior to an during any questioning; (4) If I am unable to employ a lawyer, I have the right to have a lawyer appointed to advise me prior to and during any questioning; and (5) I have the right to terminate the interview at any time. [/s/ J-P]

[/s/ JP] I have read the above rights and have had the same explained to me and do knowingly, intelligently and voluntarily waive the rights as set out above. I do hereby freely and voluntarily [/s/ J-P] without being induced by any compulsion, threats, promises or persuasion, make the following statement. Further, I do not want to consult with a lawyer before I make this statement, and I do not want to remain silent, and I now freely and voluntarily waive my right to a lawyer and to remain

silent and make the following voluntary [/s/ JP] statement: I, Johnny Paul Penry, am 23 years of age and call Livingston, Texas my home. I have decided to tell the police about me killing a chick I raped and stabbed in Livingston, Texas, and about some other people I have raped and tried to rape. [/s/ J-P]

[/s/ J-P] It was about 3 years ago when I first tried to rape someone. this Chick (anytime I say chick I mean girl) lived in a house in Goodrich, Texas, and I later heard that she worked in a dress shop in Livingston, Texas. I went to the back door and kicked it in. I had a knife but I don't know if I pulled it out on her or not. I remember that I got the chick's clothes off and gōt in bed with her. There was a little girl there about 8 years old that kept asking me not to hurt her mother. I told the little girl to get out of there or I would hurt her. I heard a car door slam about the time she (the one I was trying to rape) screamed so I put my pants back on and ran out the back door. I found out that the door slamming was my friends, Pete Jones and Mike, who I don't know his last name, who were waiting outside for me. My friends thought I was going inside the house to collect some money. I did get some money from the house. I took about $40.00 from the chick's purse. I went to the house to get a piece and [/s/ J-P]

/s/ John P. Penry
Page 1 of 4 pages

some money. I had [/s/ JP] only seen the chick once before and that was in Brookshire's store.

[/s/ J-P] The next time I tried to rape someone was just a few months later. I went to a trailer house in Goodrich,

Texas, and turned the lights off to the trailer which was located on a pole near by. When a chick came out to see about the lights I forced her back into the trailer with a switch blade knife. I told her that I would hurt her if she didn't cooperate with me. This was at night. I stayed there for a pretty long time. I made the chick give me a blow job and I also screwed her. At first she fought me but then asked me what I wanted. I told her I wanted her pussy. I first screwed her and then I got the blow job. I came both times. I threatened to kill her if she told anybody and she promised she wouldn't. A few weeks later I found out the chick told the police. I went back to her trailer and got her to open the door by disguising my voice. I was wearing a stocking over my face just as I did the first time. I got her outside and beat her up pretty good. I had my switch blade knife in my pocket. I went to the trailer to kill the chick for telling on me and I was also going to rape her again. Before I could kill her she broke loose and climbed up a TV antenna pole and got on top of the trailer. I went up after her. She went to the far end of the trailer and told me she would jump if I touched her. I grabbed her, and shook her and told her to start doing what I said. I talked to her for a minute and I got careless and shook her and she fell off the end of the trailer. I jumped off the trailer. The chick said she couldn't walk. I got scared and left. [/s/ J-P]

[/s/ J-P] About 2 months after the trailer thing I raped Diana Baker down in Signo, Texas. I was at the Courthouse setting on a bench when Diana drove up. I knew her and her husband so I went over and lied to her about my brother being in a car wreck and got her to run me to Signo. I had 2 knives on me. I used a switch [/s/ J-P]

blade this time. I took over driving and drove Diana's car through a locked gate. I told her if she cooperated with me I wouldn't hurt her. I was good to her, I didn't hurt her. We had sex in the back seat of the car. She wouldn't take her clothes off until I started to cut them off. I just screwed her twice. I got stuck and then turned myself over to 2 guys who came by. Before this we tried to get the car unstuck and talked some. I could tell she was scared and was going to tell the police so I beat her to it and told the police myself. [/s/ J-P]

[/s/ J-P] During the last two months I started looking for some more stuff. (meaning someone to have sex with). I've been getting to know Fredia, a chick in Goodrich who is about 16 or 17, and Jackie, she works at Lee's the truck stop. Jackie is the one I had thought about raping. About a week ago, on Sunday morning, I went to Jackie's house, which is about 100 yards from where I live at in Livingston, Texas. I thought Jackie would be home so I knocked on the door but noone came to the door. I thought she was hiding inside so I went to a side window and cut the screen with my pocket knife. I knew Jackie had a boy about 9 years old named Patrick who I didn't know would be home or not. I was just looking for Jackie. I didn't take anything. I left out the window I came in. [/s/ J-P]

[/s/ J-P] It was about 3 weeks ago, and before I broke into Jackie's house, a guy name Harold came out to my Aunt Evelyn's house and wanted me to help him move some heavy equipment, like ice boxes and stoves. During the day Harold and I loaded up a freezer and stove and carried it to a house located behind the Livingston Junior High School where they work on buses (I later rode over

to the house I'm talking about with a cop named Billy). We put the freezer outside and the stove inside the kitchen. There was a young goodlooking chick (the same one I stabbed later on) there and an older woman. We had to go get some parts and we had to repair the freezer and we were there about 2 hours. We left but came back later to get Harold's money. The Chick (anytime [hereafter J-P]

/s/ Johnny P. Penry
Page 2 of 4 pages

[/s/ J-P] I say Chick I'm talking about the girl I stabbed and raped) was not there when we got back so we did some more work on the equipment until my aunt came to pick me up for a doctor's appointment. The Chick had not come back to pay Harold when I left. When we were there the first time the Chick filled out something from her purse and I noticed that she had some money in there. I remember that I had seen the Chick down town before and liked her looks. They only time I talked to her was at her house when Harold and I delivered the equipment. [/s/ J-P]

[/s/ J-P] During the last 3 weeks I thought about the Chick alot. Then on the morning of October 25, 1979, which was yesterday, I got up and went to town somewhere around 8 or 9 AM. I saw a girl in City Hall who reminded me of the Chick. I decided I would go over to the Chick's house and get me a piece. I also wanted to get the money that she had in her purse. I knew that if I went over to the Chick's house and raped her that I would have to kill her because she would tell who I was to the police and I didn't want to go back to the pen. I circled the Chick's house to make sure noone else was there. I

opened my pocket knife and put it back in my pocket. The knife was open in my pocket. There was two vehicles parked there and I got suspicious. I went on and stopped anyway. I knocked on the kitchen door with one hand and the other hand was in my pocket holding the open knife. The Chick opened the wooden door and opened the screen door a little. I asked her if her husband was there and she said, "no." I asked if I could look at the stove and she asked, "what for", and I said to see if it still worked. She told me the stove was ok and I had better get out of there. I jerked open the screen door and grabbed her. I had taken my knife out of my pocket which was still open. I pushed her back into the kitchen. She was screaming and hollering for help, and knocked the knife out of my hand. I had the knife to her side before she knocked it out of my hand. We fought in the kitchen. She fell against the stove with the side of her face and I could see that she was bleeding. I also slapped her in the face after she was bleeding. I told her stop screaming that I would cut her throat. During the fighting she went to the floor twice. The second time she went to the floor she told me she was dizzy. I turned my back to her to see if anyone was coming after I had helped her up and was holding onto one of her arms. While my back was kinda to her she picked up some orange handled scissors and I remember that my eyes flashed onto a second set of scissors. She stabbed me in the back with the scissors. I turned around right quick. I got her hand and twisted her hand behind her back and we both fell to the floor. I banged her head against the floor and the scissors fell out. I picked the scissors up and threw them away and the scissors landed in the bed room. I got up

and dragged her from behind (my arms were under her arms and around her breast) into the bedroom. She told a dog which I hadn't seen before, to bite me. The dog snapped at me and I kicked it in the throat and he slid under the bed. She tried to get away and I tripped her. She landed on her back on the floor. I told her to take her clothes off and she didn't do it. While she lay on the floor I kicked her 2 or 3 times with my foot (I was wearing cowboy boots) and stomped her once. I told her again to take her clothes off and this time she said, "yeah". She was wearing sometype of house coat, gown, and panties. She kinda sat up and pulled her panties past her knees. I told her to raise her gown up so I could see it more better and she raised it past her titties. I told her to lay back down which she did. I unzipped my pants and took my dick out. She crawled over to the scissors and picked them up. I kicked them out of her hand. I drug her back to the [/s/ J-P]

/s/ John P. Penry
Page 3 of 4 pages

[/s/ J-P] middle of the bed room and roled her over on her back. I got down on her and told her that I would kill her if she didn't make love to me. This is when I hit her 2 or 3 times in the chest with my fist. She said she would. I went on and fucked her on the bedroom floor. I fucked her for about 30 minutes before I came. It was while I was fucking her that I decided to kill her with the scissors since she stabbed me with them. After I got through I went over and got the scissors by the kitchen [/s/ J-P] door. I came back and sat on her stomach. I told her that I was going to kill her that I hated to but I thought she would squeal on me. She didn't say anything. I raised the

scissors back over my head and stabbed her in the chest, she said, "Ouch" (or something), and then moaned. I got up and [/s/ J-P] zipped up my pants. She raised up and pulled out the scissors. It looked like it was easy for her to pull out the scissors. I thought I had killed her until she sat up. This scared me and I forgot all about getting her money. I ran out the door and boogied. I got on my bike and went straight home.[/s/ J-P]

[/s/ J-P] Before I got home I heard a siren. I hid behind a house until a police car passed. Then I boogied on home. When I got home I changed shirts and my dad cleaned the blood off me. I told my dad I had fallen on a stick. I threw a sweat shirt and cowboy shirt I had been wearing on the back porch. My Dad left and I put on another shirt and went next door to see if I could get some bandaids. Sharon, a girl next door, doctored my back. She wanted me to go to the doctor but I knew I would get caught if I did. I then went back home. A good while later a cop, named Billy, came by and told me a girl had been raped and stabbed. The cop asked me if I knew anything about it and I lied and said "No". Billy asked me if I would go with him and I said okay. I knew if they didn't find the stab wound on my back I didn't have anything to worry about. I figured that the Chick I stabbed was dead by now. Some officers read me my rights and then I told them they could search my house. I showed the officers my shirt and sweat shirt I wore during the stabbing and rape. The officers and I went to the Chick's house that I had stabbed and I stayed in the car. I started worrying about what I had done so I decided to tell the officers the truth about how I had stabbed and intended to kill the Chick. I also went into the Chick's house and showed the

officers my pocket knife that I had left behind, the scissors I used to stab the Chick, and the area where the rape took place. I also went before Judge G. H. Galloway who read and explained me my rights. My father and mother came in. My father read me the same rights Judge Galloway gave me. In fact my father read me my rights 2 or 3 times and explained them to me. My father asked me if I did it, I told him that I did. My father got mad and left. [/s/ J-P]

[/s/ J-P] The officers talked to me today and I decided to tell them about the other things I have done. If it had not been the Chick I stabbed and killed, it would have been Jackie or some other Chick, but I don't think it would have been Jackie because she wouldn't have fought me. [/s/ J-P]

[/s/ J-P] I cannot read or write but this statement was read to me and it is the truth to the best of my knowledge. I can understand things, I just cannot read or write.

I cannot read but this statement of 4 pages has been read [/s/ J-P] to me [/s/ J-P] and I affirm that all the facts and statements contained herein are true and correct. I further affirm that i knowingly, intelligently, and voluntarily waived the above rights prior to and during the making of this statement. [/s/ J-P] I think I need some punishment for this and help.

WITNESSES:

Harold C. Jones

Jack [Illegible]

/s/ Johnny P. Penry
Date 10-26-1979 Time: 9:35
Page 4 of 4 Pages

CAUSE NO. 15,977-C

THE STATE OF TEXAS	§	IN THE DISTRICT COURT OF
v.	§	WALKER COUNTY, TEXAS
JOHNNY PAUL PENRY	§	278TH JUDICIAL DISTRICT

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

The defendant, JOHNNY PAUL PENRY, stands charged by indictment with the offense of capital murder, alleged to have been committed on or about the 25th day of October, 1979, in Polk County, Texas. The defendant has pleaded not guilty.

1.

Our law provides that a person commits murder when he intentionally or knowingly causes the death of another.

A person commits capital murder when such person intentionally causes the death of another while such person is in the course of committing or attempting to commit the offense of aggravated rape.

2.

Our law provides that a person commits rape if he intentionally or knowingly has sexual intercourse with a female not his wife, without the female's consent.

The intercourse is without the female's consent if he compels her to submit or participate by force that overcomes such earnest resistance as might reasonably be expected under the circumstances; or, if he compels her to submit or participate by any threat communicated by actions, words, or deeds that would prevent resistance by a woman of ordinary resolution under the same or similar circumstances, because of a reasonable fear of harm.

A person commits aggravated rape if he commits rape, as defined above and he:

(a) causes serious bodily injury or attempts to cause death to the victim or another in the course of the same criminal episode, or

(b) compels submission to the rape by threat of death or serious bodily injury to be imminently inflicted on anyone.

3.

A person acts "intentionally", or with intent, with respect to the nature of his conduct or with respect to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

"Sexual Intercourse" means any penetration of the female sex organ by the male sex organ.

"Serious bodily injury" means bodily injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.

"Episode" means any event or series of events complete in itself by forming part of a larger one.

"In the course of committing aggravated rape" means conduct that occurs in an attempt to commit, during commission, or in immediate flight after attempt or commission of aggravated rape.

"Attempt" to commit an offense occurs if, with the specific intent to commit an offense, a person does an act amounting to more than mere preparation that tends, but fails, to effect the commission of the offense intended. If a person attempts an offense that may be aggravated, his conduct constitutes an attempt to commit the aggravated offense if an element that aggravates the offense accompanies the attempt.

4.

A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to the result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

5.

Before you would be warranted in convicting the defendant of capital murder while in the course of committing or attempting to commit the offense of aggravated rape, you must find from the evidence beyond a

reasonable doubt not only that on the occasion in question the defendant was engaged in the commission or attempted commission of the felony offense of aggravated rape of PAMELA CARPENTER, as defined in this charge, but also that during the commission of the aggravated rape or attempted commission thereof, if any, the defendant stabbed PAMELA CARPENTER with a pair of scissors with the intention of thereby killing her. Unless you find from the evidence beyond a reasonable doubt that the defendant, on said occasion, specifically intended to kill the said PAMELA CARPENTER when he stabbed her, if he did stab her, you cannot convict him of the offense of capital murder.

Now if you find from the evidence beyond a reasonable doubt that on or about the 25th day of October, 1979 in Polk County, Texas, the defendant, JOHNNY PAUL PENRY, did intentionally kill PAMELA CARPENTER by stabbing her with a pair of scissors and that said defendant was then and there in the course of committing or attempting to commit the offense of aggravated rape of PAMELA CARPENTER, then you will find the defendant guilty of capital murder.

If you do not so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of the offense of capital murder, and consider whether he is guilty of the lesser offense of murder.

6.

If you find from the evidence beyond a reasonable doubt that on or about the 25th day of October, 1979, in Polk County, Texas, the defendant did intentionally or

knowingly cause the death of another person, to-wit: PAMELA CARPENTER, by unlawfully stabbing her with a pair of scissors, and you have a reasonable doubt as to whether the defendant was then and there engaged in the commission of aggravated rape or attempted aggravated rape of PAMELA CARPENTER at the time of the said stabbing, if any, then you will find the defendant guilty of murder, but not capital murder.

7.

If you find from the evidence beyond a reasonable doubt that on or about the 25th day of October, 1979 in Polk County, Texas, the defendant did knowingly cause the death of another person, to-wit: PAMELA CARPENTER, by stabbing her with a pair of scissors, but you have a reasonable doubt as to whether the defendant intentionally killed PAMELA CARPENTER as the term "intentionally" has been defined herein, then you will find the defendant guilty of murder, but not capital murder, regardless of whether you found from the evidence beyond a reasonable doubt that the defendant was then and there in the course of committing or attempting to commit the offense of aggravated rape.

If you should find from the evidence beyond a reasonable doubt that the defendant is either guilty of capital murder or murder, but you have a reasonable doubt as to which offense he is guilty, then you should resolve that doubt in defendant's favor, and in such event, you will find the defendant guilty of the lesser offense of murder.

If you have a reasonable doubt as to whether the defendant is guilty of any degree of murder as defined in this charge, you will find the defendant "not guilty".

8.

You are instructed that under our law a confession of a defendant made while the defendant was in jail or other place of confinement or in the custody of an officer shall be admissible in evidence if it appears that the same was freely and voluntarily made, without compulsion or persuasion, provided, however, that it be made in writing and signed by the accused, and show that the accused has been warned prior to making such statement or confession, by the person to whom the same is made that:

(1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial; and

(2) any statement he makes may be used as evidence against him in court; and

(3) he has the right to have a lawyer present to advise him prior to and during any questioning; and

(4) he may have his own lawyer, or, if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and

(5) he has the right to terminate the interview or questioning at any time.

So in this case, if you find from the evidence, or if you have a reasonable doubt thereof, that prior to the

time the defendant gave the alleged statement or confession to Chief of Police Bill Smith, if he did give it, the said Chief of Police Bill Smith did not warn the defendant in the respects just outlined, or as to any one of such requirements just outlined, then you will wholly disregard the alleged statement or confession and not consider it for any purpose nor any evidence obtained as a result thereof. If, however, you find beyond a reasonable doubt that the aforementioned warning was given the defendant prior to his having made such statement, if he did make it, still, before you may consider such statement as evidence in this case, you must find from the evidence beyond a reasonable doubt that prior to and during such statement, if any, the defendant knowingly, intelligently and voluntarily waived the rights hereinabove set out in the said warning, and unless you so find, or if you have a reasonable doubt thereof, you will not consider the statement or confession for any purpose whatsoever or any evidence obtained as a result of same.

If you find from the evidence, or if you have a reasonable doubt thereof, that prior to the time the defendant gave the alleged statement or confession to Texas Ranger Maurice Cook, if he did give it, the said Texas Ranger Maurice Cook did not warn the defendant in the respects just outlined, or as to any one of such requirements just outlined, then you will wholly disregard the alleged statement or confession and not consider it for any purpose nor any evidence obtained as a result thereof. If, however, you find beyond a reasonable doubt that the aforementioned warning was given the defendant prior to his having made such statement, if he did make it, still, before you may consider such statement as

evidence in this case, ~~you must find from the evidence in this case~~, you must find from the evidence beyond a reasonable doubt that prior to and during such statement, if any, the defendant knowingly, intelligently and voluntarily waived the rights hereinabove set out in the said warning and unless you so find, or if you have a reasonable doubt thereof, you will not consider the statement or confession for any purpose whatsoever or any evidence obtained as a result of same.

9.

Our law provides that a defendant may testify in his own behalf if he elects to do so. This, however, is a privilege accorded a defendant, and in the event he elects not to testify, that fact cannot be taken as a circumstance against him. In this case, the defendant has elected not to testify, and you are instructed that you cannot and must not refer or allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever as a circumstance against the defendant.

A grand jury indictment is the means whereby a defendant is brought to trial in a felony prosecution. It is not evidence of guilt nor can it be considered by you in passing upon the question of guilt of the defendant. The burden of proof in all criminal cases rests upon the State throughout the trial, and never shifts to the defendant.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. The fact that he has been arrested, confined, or indicted for, or otherwise charged with, the offense gives rise to

no inference of guilt at his trial. In case you have a reasonable doubt as to defendant's guilt after considering all the evidence before you, and these instructions, you will acquit him. You are the exclusive judges of the facts proved, of the credibility of the witnesses and the weight to be given their testimony, but the law you shall receive in these written instructions, and you must be governed thereby.

After you retire to the jury room, you should select one of your members as your foreperson. It is his/her duty to preside at your deliberations, vote with you, and when you have unanimously agreed upon a verdict, to certify to your verdict by using the appropriate form attached hereto, and signing the same as foreperson.

No one has any authority to communicate with you except the officer who has you in charge. During your deliberations in this case, you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

After you have retired, you may communicate with this court in writing through the officer who has you in charge. Do not attempt to talk to the officer who has you in charge, or the attorneys, or the court, or anyone else concerning any question you may have. After you have reached a unanimous verdict, the foreperson will certify thereto by filling in the appropriate form attached to this charge and signing his name as foreperson. Suitable forms for your verdict are attached hereto; your verdict

must be in writing and signed by your foreperson. Your sole duty at this time is to determine the guilt or innocence of the defendant under the indictment in this cause; and restrict your deliberations solely to the issue of guilt or innocence of the defendant.

/s/ Joe Ned Dean
JOE NED DEAN, PRESIDING
JUDGE

G V R

The Gray-Votaw-Rogers

GENERAL ACHIEVEMENT TEST

HOB GRAY
Formerly, The University of Texas

DAVID F. VOTAW, SR.
Consultant, Educational Measurement

J. LLOYD ROGERS
Southwest Texas State College

B

★ PRIMARY 1-3

Name Penny Cohn Paul C. Grade Ungraded Boy or girl? Boy

Date Sept 29, 1971 Age last birthday? _____ When is your next birthday? _____

Name of your town or district: Mexia, Texas

Name of your building: Mexia State School

Name of your teacher: Francis Goodman

Test	Score
1. Reading: Vocab.	6
2. Reading: Comp.	15
3. Spelling	7
4. Arith. Reasoning	10
5. Arith. Compu.	14
5)	52

Total Average 10

Educational Grade 1.7

Educational Age 6-10

1. The educational grade and age scales on the Educational Chart indicate the national norms for the test (*see* Manual).
2. Age and grade values above the score 50 and below the score 9 are extrapolated, or projected by statistical method.
3. In all levels of the series (Primary, Intermediate, and Advanced), the scales of scores for all the subtests have been equated so that uniform achievement is indicated if a line connecting the score points (including total average) is approximately horizontal.

DIRECTIONS given in the manual must be followed in administering this test if the results are to be compared with the national norms.

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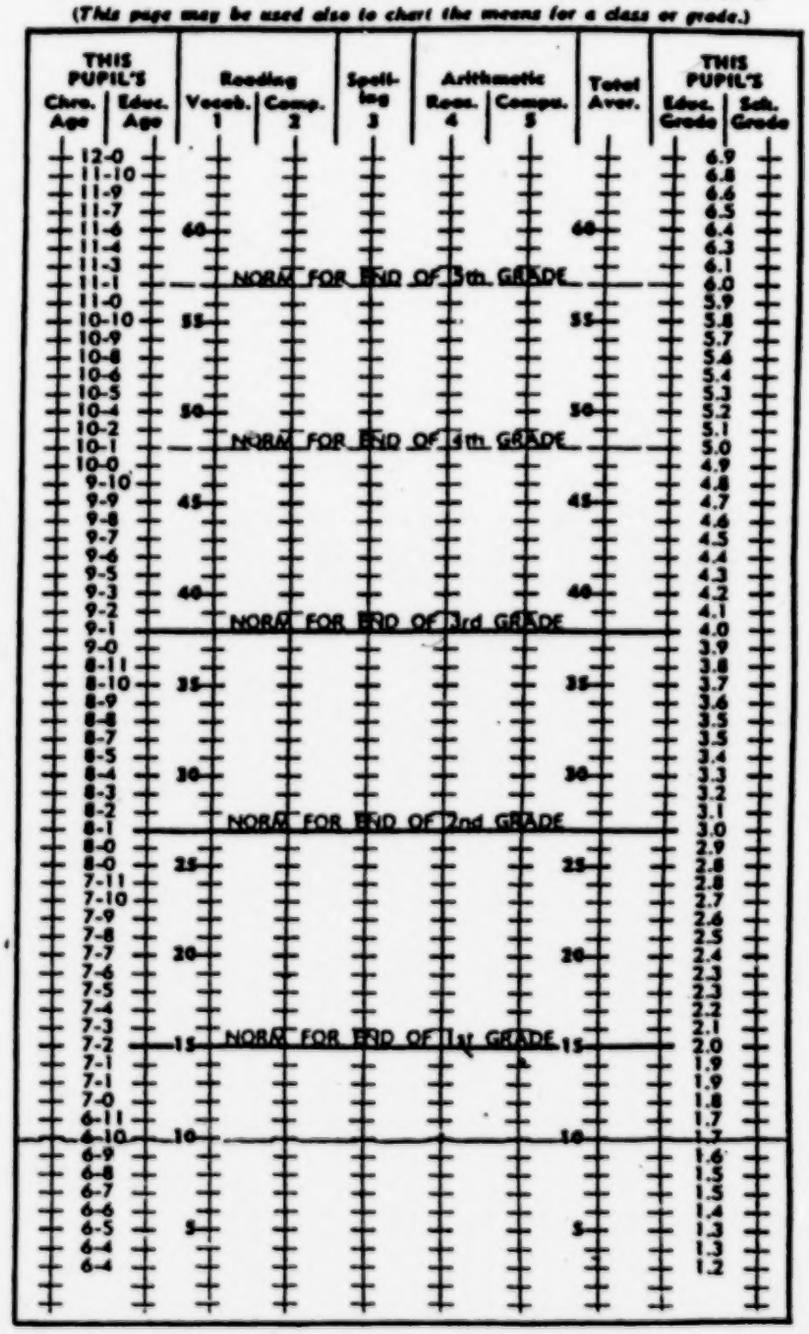
INDIVIDUAL EDUCATIONAL CHART

(This page may be used also to chart the means for a class or grade.)

THIS PUPIL'S Chro. Age	THIS PUPIL'S Educ. Age	Reading Vocab. 1	Reading Comp. 2	Spelling 3	Arithmetic Reas. 4	Arithmetic Compu. 5	Total Aver.	THIS PUPIL'S Educ. Grade	THIS PUPIL'S Sch. Grade
12-0								6.9	
11-10								6.8	
11-9								6.6	
11-7								6.5	
11-6		60					60	6.4	
11-4								6.3	
11-3								6.1	
11-1		NORM FOR END OF 5th GRADE						6.0	
11-0								5.9	
10-10		55					55	5.8	
10-9								5.7	
10-8								5.6	
10-6								5.4	
10-5								5.3	
10-4		50					50	5.2	
10-2								5.1	
10-1		NORM FOR END OF 4th GRADE						5.0	
10-0								4.9	
9-10								4.8	
9-9		45					45	4.7	
9-8								4.6	
9-7								4.5	
9-6								4.4	
9-5								4.3	
9-3		40					40	4.2	
9-2								4.1	
9-1		NORM FOR END OF 3rd GRADE						4.0	
9-0								3.9	
8-11								3.8	
8-10		35					35	3.7	
8-9								3.6	
8-8								3.5	
8-7								3.5	
8-5								3.4	
8-4		30					30	3.3	
8-3								3.2	
8-2								3.1	
8-1		NORM FOR END OF 2nd GRADE						3.0	
8-0								2.9	
8-0		25					25	2.8	
7-11								2.8	
7-10								2.7	
7-9								2.6	
7-8								2.5	
7-7		20					20	2.4	
7-6								2.3	
7-5								2.3	
7-4								2.2	
7-3								2.1	
7-2		15	NORM FOR END OF 1st GRADE				15	2.0	
7-1								1.9	
7-1								1.9	
7-0								1.8	
6-11								1.7	
6-10		10					10	1.7	
6-9								1.6	
6-8								1.5	
6-7								1.5	
6-6								1.4	
6-5		5					5	1.3	
6-4								1.3	
6-4								1.2	



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DEFENDANT'S EXHIBIT 4

36

2

TEST 1. READING: VOCABULARY

DIRECTIONS: Draw a line under the word that tells about the picture or makes the sentence true. Do your best to find the right word, and then draw a line under it.

SAMPLES:

a. **boy** **ball** **girl** **bird**

b. A small thing is
red **little** **good** **soft.**

1. dress boat dog kite

2. grass dress boat door

3. airplane pond snow lamb

4. drum hen car flower

5. hat drum flag toy

DEFENDANT'S EXHIBIT 5

Division of Child Psychiatry

To Whom It May Concern:

One of your pupils, JOHN PENRY, has been referred to the Division of Child Psychiatry. A description of the pupil's behavior, achievement and any impressions you have will be extremely useful in our evaluation.

We would like to know something about this pupil's academic ability. What are the typical grades? What are the strong areas? Which tasks create difficulties? Is this pupil in a slow, average, or accelerated group (if your school has such a system)?

[He is in a class for mentally retarded.]

What standardized academic or psychological tests have been given? When were these given and what scores were made on them?

[Scored about 60 I.Q. on test administered by Cameron McKinley – about 2 yrs ago.]

How does this child relate to you and to teachers?

[He listens to me when I admonish him. Says he understands – but really only understands a word once in a while.]

(Signed) /s/ R.R. Greens

(Position) Elem. Sch. Principal

(Address 4512 Highway #3 Division

(Telephone 534 4342 School
534 6035 Home

Date: 6-9-65

We appreciate your cooperation in providing this information. If you have specific questions regarding this child please let us know. Upon your request and with the parents' written permission we will share with you information and suggestions pertinent to this child's educational needs.

When completed, please mail this form
to: Henry L. Burks, M.D.
Chief
Division of Child Psychiatry
University of Texas Medical Branch
Galveston, Texas

DEFENDANT'S EXHIBIT 6

PENRY, JOHN
Age: 9-3

DCP # 65101
PSY # 5447
Dictated by:
Charles Eubanks, Dr. June Good

PSYCHOLOGICAL REPORT
August 25, 1965

John obtained a full scale I.Q. of 56 placing him in the mental defective range of intelligence. He is a very small boy who sat quietly during the testing session. Although he has a hesitant manner he seemed eager to please and readily cooperated with the examiner. When consistently faced with his inability to perform tasks he reacted with a patient persistence and continued to attempt to satisfactorily complete the tasks.

His conceptual level is very immature, primitive and undifferentiated. Both his performance on the intelligence test – verbal I.Q. of 72, performance I.Q. of 47 – and the perseveration difficulty with closure and directionality which he showed on the replication of geometric designs are indicative of a significant degree of brain damage.

He may have some feeling of possible desertion and rejection by his mother although he seems accepting of this condition.

John seems so seriously impaired that he is incapable of intellectually functioning at anything like an age appropriate level. However, he is amenable and should be capable of benefiting from special training. There seems to be little emotional overlay. He is neither discouraged by failure nor lacking in impulse control.

Impression: Mental retardation with significant degree of organicity.

Tests Given:
WISC
Verbal I.Q. – 72
Performance I.Q. – 47
Full Scale I.Q. – 56
Bender-Gestalt

Others –
House, Tree, Person
Rorschach Cards I, II, III

Charles Eubanks/June A. Good, Ph.D.
Psychologists

CE/JG/pk
9-27-65

Div. of Child & Adolescent Psychiatry
University of Texas Medical Branch
Galveston, Texas 77530

DEFENDANT'S EXHIBIT 7

Name John Paul Penry

I DATE OF EXAMINATION: 6-10-71

II REASON FOR REFERRAL: Educational prescription

III GENERAL OBSERVATION: John liked to swim. He was small for his age, neat looking, hair well-groomed. He spoke very softly.

On the WRAT, he was asked to count as high as he could. He began making mistakes after 39 but went to 100 with frequent errors, most of them occurring after 7 or 8 in the series.

Results of the D-A-P: The drawing was immature. There were two human figures and a sun. On both the human figures the ears were drawn above the eyes on the forehead rather than on the sides of the head. There was no hair on either head. The shapes of the heads were unusual. The bodies were long thin rectangles covered by straight "shifts" with 4 buttons down the front and a belt down low on the "hips." The arms and legs were straight match-sticks complete with heads. Only one of the figures had arms and legs.

Results of the Beery: Visual-Motor Integration Age Equivalent was 6 years, 0 months compared to a chronological age of 15 years, 1 month. John had difficulty with number concepts, spatial relationships, three-dimensional representation, and angularity. The results indicated a moderate to severe perceptual-motor problem.

Results of the SCQ: This 15-year-old boy reported that he likes dolls. Most of the responses were adequate but John seemed to have very little realization of his own limitations. Although he had been

in the school for three years, he apparently remembered well his mother's attitude and actions toward him. He seemed also to resent others' reactions to his own misbehavior.

Results of WRAT-Level II:

	Grade Level	Standard Score	Percentile
Reading	Gr. 1.5	57	0.5
Spelling	Gr. 1.9	59	0.7
Arithmetic	Kg. .8	53	0.1

The results were in general accord with his measured I.Q. of 51 (WISC, VIQ=55, PIQ=55, FSIQ=51, 7-8-68). He may have been a little low on arithmetic which he said he hates. On the reading test he was able to read only two of the words (in, tree). He could not read words such as milk, city, animal, himself, chin, split, and form. Although he could spell his full name he could spell only "cat" on the test. He was not able to spell "run," "arm," or "train." He was not able to copy all of the marks and had two reversals out of 18 forms.

On arithmetic he could not solve very simple addition or subtraction problems, could not read two digits together (41), and did not know that 42 is more than 28.

Results of the ITPA: Composite Psycholinguistic Age was 7 years, 2 months compared to a chronological age of 15 years, 1 month. The estimated mental age of 7-4 would result in an I.Q. equivalent of 49, approximately his measured I.Q. of 51. John was stronger on the representational level than on the automatic level. There was very little difference between the auditory-vocal and visual-motor channels. He was very weak on short-term memory, especially for auditory stimuli, functioning at the

level of a child 4 years, 8 months of age. His organizing process was his weakest generally. That included association and closure along with memory. The receptive process was a little better. His relative strength was in the expressive process, especially verbal expression. That was the only subtest on which he exceeded the norms for children 10 years of age.

IV TEST RESULTS (AND ABBREVIATIONS THEREOF):

A. WISC – Wechsler Intelligence Scale for Children (or)
WAIS – Wechsler Adult Intelligence Scale (or)
WPPSI – Wechsler Preschool and Primary Scale of Intelligence

Verbal Subtests	Scaled Scores	Performance Subtests	Scaled Scores
Information	_____	Picture Completion	_____
Comprehension	_____	Picture Arrangement	_____
Arithmetic	_____	Block Design	_____
Similarities	_____	Object Assembly	_____
Vocabulary	_____	Coding	
(Digit Span)	_____	(Digit Symbol)	_____
(Sentences)	_____	Mazes	_____
		Geometric Design	_____
		Animal House	_____
Verbal Scale IQ	_____	Performance Scale IQ	_____

Full Scale IQ 56 (5-2-66)
58 (7-8-68)

B. LIPS – Leiter International Performance Scale
M.A. ___ C.A. ___

C. Arthur Adaptation of the Leiter International Performance Scale
M.A. ___ C.A. ___

D. SIT – Slosson Intelligence Test
IQ = ___ Mental Age = ___

E. VINELAND – Vineland Social Maturity Scale
Age Score ___ Social Quotient ___

F. PPVT – Peabody Picture Vocabulary Test
Form A B Percentile = ___
Mental Age = ___ IQ = ___

G. HISKEY-NEBRASKA – Hiskey-Nebraska Test of Learning Aptitude

**H. WRAT – Wide Range Achievement Test

Subtest	Grade Level	Standard Score	Percentile
Reading	1.5	57	.5
Spelling	1.9	59	.7
Arithmetic	Kg. .8	53	.1

I. PIAT – Peabody Individual Achievement Test

Subtest	Grade Equivalent	Percentile	Standard Score
Mathematics			
Reading Recognition			
Reading Comprehension			
Spelling			
General Information			
TOTAL TEST			

J. SPACHE – Spache Reading Diagnostic Scales

1) Word Recognition – List No. ___,
Grade Placement Score ___
2) Instructional Level (Oral Performance) ___
3) Independent Level (Silent Reading) ___
4) Potential Level ("Listening Level") ___
5) Supplementary Phonics Test
a) Consonant sounds (missed):

b) Vowel sounds

c) Consonant blends (missed):

d) Common Syllables

e) Blending

f) Letter Sounds (missed):

K. T.O.B.E. – Test of Basic Experiences Level K L

Test	Standard Score	Percentile	Stanine
Mathematics			
Language			
General Concepts			
Science			
Social Studies			

L. The Basic Concept Inventory

**M. D-A-P – Draw-A-Person Immature drawing. Evidence of perceptual difficulties.

**N. BEERY – Beery-Buktenica Developmental Test of Visual-Motor Integration (VMI)
C.A. = 15-1 VMI Age Equivalent = 6-0

**O. ITPA – Illinois Test of Psycholinguistic Ability

RESULTS OF THE ITPA

Subtest	Language Age	Scaled Scores	Deviation from Mean Scaled Score +	Deviation from Mean Scaled Score -
1 Auditory-Reception	8-0	Not applicable Test designed for children 2-10.		
2 Visual Reception	6-5			
3 Auditory Association	5-9			
4 Visual Association	6-10			
5 Verbal Expression	10-11			
6 Manual Expression	8-4			
7 Grammatic Closure	6-0			
8 Visual Closure	8-0			

9 Auditory Sequential Memory	4-8
10 Visual Sequential Memory	6-6

Supplementary Tests:

11 Auditory Closure	5-1
12 Sound Blending	

TOTAL: Language Age 7-2 Chronological Age 15-1
Mental Age 7-4

P. WEPMAN – Wepman Auditory Discrimination Test, Form 1

**Q. SCQ – Sentence Completion Questionnaire Unusual responses included the statement that he likes dolls. Little recognition of limitations.

R. TAT – Thematic Apperception Test

S. CAT-H – Children's Apperception Test – Human

T. Piers-Harris Children's Self-Concept Scale

A. Significant Cluster Scores
1. Behavior
2. Intellectual & School Status
3. Physical Appearance and Attributes
4. Anxiety
5. Popularity
6. Happiness and Satisfaction

Comments: _____
_____
_____
_____

B. Norm Scores (grades 4-12 only)
Percentile ___ Stanine ___

V SUMMARY AND CONCLUSIONS:

D-A-P: Immature drawing. Evidence of perceptual difficulties.

Beery: VMI Age Equivalent 6-0
Chronological Age 15-1

Results indicated a moderate to severe visual-motor integration problem.

SCQ: Some unusual responses included the statement that he likes dolls. There was little recognition of his own limitations.

WRAT-Level II:	Grade Level	Standard Score	Percentile
Reading	Gr. 1.5	57	0.5
Spelling	Gr. 1.9	59	0.7
Arithmetic	Kg. .8	53	0.1

Results were generally in line with his measured I.Q. of 51.

ITPA: PLA 7-2
CA 15-1

John's relative strength was in verbal expression and to a lesser degree manual expression. He was very weak on sequential memory tasks, especially for auditory stimuli. He was generally weak on organizing abilities.

Attachments 47

VI EDUCATIONAL IMPLICATIONS:

John Paul needs a lot of practice on visual-motor integration tasks. This should not present any problem for the teacher because John said that he likes to draw. Regular, frequent, brief periods of remediation exercises should be included in his program

of learning. He may need to begin by tracing and gradually proceed to higher levels of visual-motor skills. See the attached sheets for suggestions and procedures to help overcome this deficit.

There are a number of specific and general remediation procedures designed to help the child to a higher level of performance on academic skills such as those measured by the Illinois Test of Psycholinguistic Abilties and the Wechsler Intelligence Scale for Children. On the attached sheets you will find John Paul's current level of functioning written in at the top. There is a check mark beside the place where remediation work should probably begin. Of course, the classroom teacher will have to use her own judgment based on a longer period of acquaintance with and observation of the child. The sheets contain suggestions and recommendations. They may have to be adapted or modified to suit the teacher and the pupil.

MEXIA STATE SCHOOL
Mexia, Texas

Intake Summary

NAME: Johnny Paul Penry BORN: 5-5-56

NO: 31602 Adm: 5-23-68

NOTIFYING ADDRESS:
Mr. and Mrs. John G. Penry
4202 Bruce, Box 387
Bacliff, Texas 77518

REPORT DATE: 7-16-68

LEGAL STATUS: The parents retain custody of this child.

REASON FOR REFERRAL: The family was unable to control subject in the home. Also, subject's siblings must be considered. The doctors advised the family that subject needs special training.

DEVELOPMENTAL AND MEDICAL HISTORY: The mother was 18 years of age at the birth of subject. Born previous to subject's birth was one normal girl; subsequent to subject's birth a normal girl was born and also a boy of apparent normalacy.

The mother received prenatal care and although she is diabetic, she had general good health during this pregnancy. During pregnancy the mother had hypertension. X rays of the abdomen were taken for unknown reasons. Delivery was at full term and labor was spontaneous. The baby weighed 7 lbs., 12 1/2 ozs., and breathed spontaneously. Mrs. Penry suffered a postpartum psychosis after the birth of both male children. After the birth of

subject she was in Oklahoma State Hospital for ten months.

Soon after mother's return to the home, subject received severe burns on his legs and lower part of the body. The mother reported that while she was bathing him in the kitchen sink she left him alone for a short period and he turned on the hot water. He now has severe scars on his legs. He complains frequently of his legs and feet hurting.

At ten months, subject was described as being a high tempered child and if he didn't get his way he would have temper tantrums. He was said to be hyperactive and it is reported that at one time he jumped out of his high chair and broke his arm. He walked at age one and began talking the same year. He head-banged until he was five years old. He is able to perform most self-help skills but is occasionally enuretic.

Mental deficiency was noticed at seven years. The etiology was determined to be organic brain syndrome due to birth trauma. An EEG given to the child revealed normal waking and sleep tracing.

DESCRIPTION OF PERSONALITY: This normal appearing, Caucasian male appears undersized for his age of twelve. His parents report him as being happy, aggressive, excitable, and stubborn. If he does not get his way he has a temper tantrum and bites, pinches, and chokes other children. He plays fairly well with other children as long as he is watched; otherwise, he is hateful. He wanders from home if left unattended. He is careless and not afraid of getting hurt. Under supervision, subject will work in the yard and house.

SCHOOL HISTORY: Johnny started to school at age six, but proved to be uncontrollable in the classroom and failed the first grade. The next year, his teacher advised that he be placed in special education classes. He was taken out of this class because he still could not be controlled. Also, his mother thought that special education was doing him no good.

PSYCHOLOGICAL EVALUATIONS: In July and August, 1965, Johnny was seen at the University of Texas Medical Branch in Galveston for diagnostic evaluation. John was a small boy who sat quietly during the testing situation. He had a hesitant manner but seemed eager to please and readily cooperated with the examiner.

The results of psychological testing found Johnny to have a very immature conceptical level and was primitive and undifferentiated.

Verbal IQ = 72
PIQ = 47
FSIQ = 56

An EEG indicated normal waking and sleep tracing. It was the opinion of the clinic that this boy represented a classical example of an organic brain syndrome with mental retardation and behavioral disturbance.

FAMILY HISTORY: John Garner Penry, father of subject, was born September 10, 1932, in Livingston, Texas. He received a high-school education and is now employed by American Bakeries Company of Texas City, Texas.

Shirley Ann Lane Penry, mother of subject, was born January 23, 1938, in Conroe, Texas. She received a tenth-

grade education. She married John C. Penry on March 23, 1953. This is the only marriage for both parents.

SIBLINGS: Trudy Ann Penry, born May 17, 1954, in Houston, Texas, is a student and lives at home.

Sally Belinda Penry, born 9-11-58, in Bacliff, Texas, is a student, living at home.

Jesse Dwane Penry, born December 18, 1962, in Bacliff, Texas, is living at home.

INTAKE INTERVIEW: Subject was presented for admission by his parents. Throughout the interview both parents seemed reluctant to discuss their true problems and evaded direct questions concerning their relationship with subject. The father was greatly concerned about subject's religious training as a Jehovah Witness and had difficulty in controlling his emotions (his lips quivered and eyes filled with tears) as he quoted scripture and explained his beliefs. The mother, though never removing her dark sun shades, wept frequently throughout the interview and had very little to say. Both parents were rigid when parting with subject and showed no affection. The mother did not say anything to subject, but hurridely went to the car, crying and sobbing aloud for a few seconds, I got the impression that she felt this was expected of her.

A few days after admission, when subject's hair was cut, it was discovered he had many small scars over his head. When asked how he received the scars, he said they

were from cuts made by a large belt buckle which his mother used when whipping him.

/s/ Pam Naylor
Pam Naylor, Student
Caseworker

(Mrs) Annette Parker
Caseworker, Team III

PN/rp/cba

DEEP EAST TEXAS REGIONAL
MENTAL HEALTH MENTAL RETARDATION SERVICES
TRINITY COUNTY OUTPATIENT CLINIC

Psychiatric Evaluation

NAME:
JOHNNY PAUL PENRY CASE: ~~1264~~ 7722

WORKER: DATE: May 19, 1977
FELIX PEEBLES, M.D.

PRESENTING PROBLEM:

This client was referred to the Trinity County Outpatient Clinic for psychiatric evaluation by Polk County District Judge Ernest C. Coker.

PERSONAL HISTORY:

This client is a 21 year old white single male who was born May 5, 1956. He was born in Lawton, Oklahoma and has lives much of his life in Texas. There is no history of abnormality in his birth, however, he does have a history of temper tantrums, bedwetting, and nightmares and does occasionally bite his nails. He indicates that the bedwetting is still a problem at times.

He was very slow to learn and had a later than average history of learning to walk and talk and do all of the other things that average children do. He was entered in the 1st grade in school and went most of that year but did not proceed in school. He had difficulty learning and understanding and could not compete with the other first graders. He has never learned to read and write.

He says he is in good physical health and he has had no major illnesses and no major surgery. He said he had

some tests in Ben Taub Hospital in Houston but he does not know the date. He said he was in one accident about 6 months ago after he had stolen a car. There were no apparent ill effects. He is not under a physician's care at this time and is not taking any medication. He believes he remembers taking some Mellaril and Thorazine back through the years from time to time.

He has held a number of jobs mostly around restaurants such as busboy or dishwashing. He does relate that he worked at the Sirloin Stockade in Lufkin, Texas but he was fired because he took the ice cream machine apart to clean it and could not put it back together. He thinks it was about 10 weeks that he was on the job at that location.

The client's father is John Penry, age 42 and is described as being in good physical health. The client indicates that he does not have a good relationship with his father. He says he has a lot of childhood memories of his father always being too hard on him. He has expressed being afraid of his father. He says his father calls him retarded and that this makes him very mad because he is not retarded. He just has some difficult in learning.

This client's mother is Shirley Penry and the client does not know her age. He says, "My mom takes care of me". He believes his parents are divorced and that there is some conflict between his parents and that there has been some conflict for as long as he can remember. He prefers his mother to his father.

This client is the 2nd of 4 siblings, he has an older sister 23 years of age and he does not get along with her because, "She tells on me". There is a younger sister age

18 and a younger brother who is 15. Prior to the time he got into his present trouble he was living with his step-brother who is 23 years of age.

He remembers fighting with his parents when he was growing up and running away from home quite a bit. He indicates that he was physically abused as a child which caused his rebellious reactions.

PRESENT ILLNESS:

This client is a 21 year old Mexican-American single male who has a history of having been admitted to Austin State Hospital and transfered to Rusk State Hospital because he was a legal resident of Polk County which was in Rusk State Hospital's catchment area. This was from the latter part of 1973 until the early part of 1974. He relates the story of seeing a woman in Livingston and he liked her looks very much and told her a story about his brother getting in a car wreck and wanting him to take her down the street to it and gained entrance into the car. He related that he had a switch blade knife and he produced it and ordered her to drive out of town and came to a road turning off of the highway where there was a gate. He said he ordered her to ram the car through the gate and break it down and she did not and he took the wheel of the car and broke through the gate and drove down into an area out of sight from the road and did have sexual intercourse with her.

They were driving back toward Livingston, Texas and something happened to the car and he and the female whom he had abducted and with whom he had had sexual intercourse got out and started walking. They met a pickup and he got out in the middle of the road and

flagged the pickup down. He asked for a ride and at that time the woman told the man that she had been abducted and raped by this client, Johnnie Paul Penry, at which time the man produced a shotgun he had in the pickup and held it on Johnnie Paul Penry and turned him in in Livingston, Texas for this offense. Johnnie says he is charged with Kidnapping and Rape.

He believes this was in February but he does not know what date and says that he has not seen an attorney and does not know when disposition will be made of his case. He thinks he has been in the Polk County Jail for about three months.

He says that he has been arrested many times for problems relating to stealing, arson, and other crimes. He relates that he has on occasion heard voices and saw things, but he is very vague and I feel that he probably learned this in Rusk State Hospital and is using this as an excuse to cover up his offenses. He said he meant no harm to the woman whom he raped that he had never had a woman before and he wanted to see what it would be like to have a woman. He admits that he has been having problems with the law and with other people for as long as he can remember.

MENTAL STATUS:

His speech is fairly spontaneous and is entirely coherent and relevant at the time of this interview. I see no evidence of any auditory or visual hallucinations or of any delusional thought content or psychotic thought process at the time of this interview. His psychomotor activity is slightly accelerated and his mood is quite anxious and his affect is appropriate for his mood.

He is oriented as to the month and date of it being May 19, but he is unsure of the year. He guesses all the way from 1971 to 1975. His memory is moderately impaired for both recent and remote past events. On retention and recall he can only repeat one number correctly in forward order and none in reverse order, whereas the average person can repeat 5 or 6 numbers correctly both in forward order and reverse order. He is unable to interpret proverbs at all and certainly is unable to do any abstract thinking. On his grasp of general information he reveals that he believes Nixon is President and has no idea who the Vice President of the United States or the Governor of Texas, or of any other important people are at this time. His judgement and insight are quite severely impaired.

DIAGNOSIS:

1. Mental Retardation-moderate.
2. Adjustment Reaction of Adult Life.

It is my professional opinion that Johnnie Paul Penry is presently competent to stand trial and assist his counsel in the preparation of his defense. However, he is moderately retarded and his judgement and insight are moderately to severely impaired. He also has some antisocial features which account for him not learning by his past mistakes and making some of the same mistakes over again. He has little regard for others or even himself. His primary interests being immediate gratification of his impulses even without regard to consequence to himself.

It is my further professional opinion that Johnnie Paul Penry is and was sane at the time of the commission of the offense. At that time, and certainly at this time, he shows no evidence of psychosis or a break with reality or

of not being aware of what he was doing or what was going on around him. It is true that his judgement and insight are impaired but he is sane in the legal sense.

It is my further professional opinion that if Johnnie Paul Penry were released from custody that he would be dangerous to other persons. I base this judgement on the fact that he tells me he did have a weapon and did produce this weapon and did threaten the woman with a switch blade knife if she did resist him. He does not have adequately developed internal self controls and has a long history of conflicts with people and difficulty with his interpersonal relationships leading back to childhood and conflicts with his parents. And by his own admission he has been arrested "many times" for problems relating to stealing, arson, and other crimes. A person of this sort who is moderately mentally retarded does not comprehend properly what is going on around him and frequently responds inappropriately. Another thing that is disturbing is antisocial features which he has exhibited consisting of the apparent inability to love or be loved, to make lasting friends, to develop adequate interpersonal relationships, lack regret for past offenses. He also has not learned from his mistakes and is likely to continue making some of his same mistakes over again.

/s/ Felix Peebles
Felix Peebles, M.D.
Psychiatrist

FP/mw

TEXAS REHABILITATION COMMISSION

CERTIFICATION OF ELIGIBILITY, INELIGIBILITY, OR EXTENDED EVALUATION
(RSM No. 02-5)

In accordance with the Texas State Plan for Vocational rehabilitation, I hereby certify that in the case of Johnny Paul Penry

1. [X] There exists a mental or physical disability:

Mental Retardation – Mild with 532102
Anti social Primary Disability Tendencies Code

Poor Visual Acuity-Hyperopia 149.02
Secondary Disability Code

*The resultant functional limitations of the disability(s) are as follows:

1. Inability to perform basic academic skills.
2. Limited vocational experience.
3. Frequent impulsive and anti social acting out behaviors.
4. Poor visual acuity-hyperopia.
5. Unstable family background.
6. Lack of financial resources.

2. [X] The disability as described above constitutes a substantial handicap to this individual's employment in that: (RSM No. 02-4, para. 1.A.) This client is prevented in accepted job training in many skilled areas due to his inability too perform basic academic skill. He is unable to complete written job applications. He has little exposure to the labor market and is not aware of the expectations of employers. Johnny has little

internal control of his basic drives which has resulted in frequent impulsive acting out behavior. He has served 4 years of a 5 year sentence to TDC for rape and has a long history as a juvenile of anti social behaviors. His recent physical exam revealed a visual defect that can be corrected with prescription lenses. Johnny's family background is very disturbed and has lead to many of his anti social behavior and directly influenced his lack of basic education. He is frequently upset by his family's current religious affiliation which contrasts his social skills. At this time Johnny has no financial resources from a job or the family.

3. [ ] I am unable at this time, to make a determination that Vocational Rehabilitation Services will benefit this individual in terms of employability, unless there is an extended evaluation to determine rehabilitation potential. (RSM No. 04-1.)

Counselor _____ ____ Date _____
Signature No.

4. [X] There is a reasonable expectation that Vocational Rehabilitation Services will benefit this individual in terms of employability (RSM No. 02-4, para. 1.B., and RSM No. 06-4)

5. [ ] The requirements for eligibility were not met for the following reasons: (RSM No. 02-5.)

[ ] Handicap too severe

[ ] No disabling condition

[ ] The disability does not constitute a substantial handicap to employment

[ ] Other _____
(Specify on back)

Counselor /s/ [Illegible] 567 Date 10-17-79
Signature No.

Form TRC-405A (F.e., Feb. 1979) (Supersedes Form TRC-405 dated Jan. 1, 1979) 9

TEXAS REHABILITATION COMMISSION

CLIENT ASSESSMENT AND PLANNING
(To be completed at the time of
or prior to development of the IWRP)

1. Client Vocational Assessment

A. Vocational Assets

1. Young age-23
2. Overall good physical health.
3. Verbal expressions of motivations to return to the competitive labor market.
4. Neat in personal appearance.
5. Cooperative in planning his vocational program.

B. Vocational Limitations

1. Lack of basic academic skills-inability to read or write.
2. Limited vocational experience.
3. Lack of appropriate internal control system resulting in frequent antisocial and aggressive behaviors.
4. Lower intellectual level of functioning creating interference in clients ability to learn adaptive behaviors.
5. Poor visual acuity to perform fine motor tasks.
6. Family discord.

2. Describe how the planned vocational objective relates to the client's vocational assets, limitations, and vocational handicap.

We will attempt to enhance this clients vocational assets by providing him a stable living arrangement and a job. This client will require intensive personal social adjustment training to learn basic adaptive behaviors. He has to learn more control in order to remain outside penal institutions.

3. Describe how the services to be provided will remove or reduce the vocational handicap.

We will provide the client with:

1. Personal Social Adjustment Training
2. Work Adjustment Training
3. Single vision lenses and frames to correct his poor visual acuity.

This clients behaviors can be adapted to allow him to become more socialized. I feel he can become financially independent with a job placement. He will require assistance in locating a job. His handicapping conditions can be somewhat reduced to enable him to function appropriately in society.

TEXAS REHABILITATION COMMISSION –
VOCATIONAL REHABILITATION DIVISION

REPORT OF GENERAL PHYSICAL EXAMINATION

CONFIDENTIAL*

SECTION I (V R AGENCY FILLS OUT)

DATE 09-25-79

Penry	Johnny	P
(Last Name)	*(First Name)*	*(Middle Name)*

_____	White	M xF	(S) M OTHER
(Age)	(Race)	(M/F)	(Marital)

RR. 1, Box 1426 ([Illegible])

Livingston (City or Town)

Polk (County) | Texas (State) | 77351 (Zip)

SHORT DESCRIPTION OR HISTORY OF ALLEGED HANDICAP (BY COUNSELOR) Mental Retardation-Mild

SIGNATURE _____ ([Illegible])

ABOVE NAMED IS APPLYING FOR VOCATIONAL REHABILITATION SERVICES REGULATIONS REQUIRE A RECORD OF PHYSICAL EXAMINATION TO ASCERTAIN PRESENCE OR ABSENCE OF PHYSICAL DISORDERS SO THAT DETERMINATION OF ELIGIBILITY FOR SERVICES CAN BE MADE. PROMPT COMPLETION OF THE FORM BELOW WILL BE APPRECIATED.

SECTION II (BY PHYSICIAN)

CONDENSED MEDICAL HISTORY Childhood dis 3'-2nd degree L leg burns at age 4

IF APPLICANT IS YOUR PREVIOUS PATIENT. PLEASE STATE SIGNIFICANT DISORDERS No.

EXAMINATION:

HEIGHT 5'7" WEIGHT 135½ PULSE RATE 102 BLOOD PRESSURE 130/74 VISION (SNELLEN) RT 20/___ L 20/___ WITH GLASSES IF AVAILABLE BY 20/___ L 20/___

HEARING (ORDINARY CONVERSATION) RT ___ 20 20 FT LEFT ___ 20/20 FT

		NORMAL ✓	ABNORMAL X
1	HEAD SCALP	✓	
2	EYES		X
3	EARS-NOSE-THROAT	✓	
4	DENTAL-MOUTH	✓	
5	NECK	✓	
6	SKIN		X
7	CHEST LUNGS	✓	
8	HEART ARTERIES	✓	
9	ABDOMEN	✓	
10	HERNIAS	✓	
11	BONES-JOINTS	✓	
12	MUSCULAR	✓	
13	NEUROLOGICAL	✓	
14	GENITO URINARY	✓	
15	RECTAL	✓	
16	PELVIC		
17	OTHER		

PLEASE ELABORATE ON ALL ABNORMALS CHECKED (BY NUMBER)

2 – Apparent poor vision – Difficult to test pt. don't know read.

6 – Scaring on L calf and behind L knee. 2nd to 3'. 2nd degree burns at age 4.

[Illegible] APRIL 1977.

EXPLANATION

LABORATORY

URINE DIPSTICK – URINALYSIS FOR PROTEIN, SUGAR AND HEMOGLOBIN IS REQUIRED OR COMPLETE URINALYSIS WITH MICROSCOPIC IF EXAMINER FEELS IT IS NEEDED

BLOOD PHYSICIAN MAY DO HEMORGLOBIN (OR HEMATOCRIT) IF INDICATED SEROLOGY ONLY WHEN INDICATED

X-RAY WITH THIS GENERAL EXAMINATION, CHEST X-RAYS (AP & LATERAL) ARE AUTHORIZED WHEN PHYSICIAN INDICATES NEED SHOULD BE OBTAINED IF EVIDENCE OF PAST OR PRESENT TB EXISTS OR PRESENCE OF OTHER ACTIVE PULMONARY DISEASE IS FOUND DURING EXAM OTHER X-RAY STUDIES REQUIRE PRIOR AUTHORIZATION FOR PAYMENT BY COUNSELOR.

REPORT OF LAB OR X-RAY

LIMITED URINALYSIS (CHEMICAL DIPSTICK)
PROTEIN _____

SUGAR _____

HGS _____

COMPLETE URINALYSIS
SP GR 1.027

PM 5.0

PROTEIN +

SUGAR Neg

MICRO [Illegible]

X-RAY OF CHEST – (BRIEF OF ABNORMAL FINDINGS)

_____

DIAGNOSTIC FINDINGS AND/OR IMPRESSIONS

Depressive reaction by history
[Illegible]

YOUR OPINION:

CAN THE MAJOR DISABILITY BE REMOVED [✓] YES [ ] NO OR SUBSTANTIALLY IMPROVED [✓] YES [ ] NO BY MEDICAL OR SURGICAL TREATMENT

DO YOU RECOMMEND:

SPECIALIST CONSULTATION [✓] YES [ ] NO. IF YES SPECIFY TYPE Psychiatric

EYE REFRACTION [✓] YES [ ] NO: OTHER DIAGNOSTIC PROCEDURE [ ] YES [ ] NO

PROSTHETIC APPLIANCE [ ] YES [ ] NO.

HOSPITALIZATION [ ] YES [ ] NO

TREATMENT [ ] YES [ ] NO.

PLEASE ELABORATE ALL "YES" ANSWERS

Pt needs poss Psychiatric Consultation as well as [illegible].

PHYSICAL CAPABILITIES

(USE THE FOLLOWING SYMBOLS ✓ = NO LIMITATIONS, X = LIMITATIONS, 0 = TO BE AVOIDED:

PHYSICAL ACTIVITIES

PULLING	✓
LIFTING	✓
PUSHING	✓
REACHING	✓
WALKING	✓
STOOPING	✓
KNEELING	✓
OTHER	✓

WORKING CONDITIONS

OUTDOORS ✓

INDOORS ✓

HIGH HUMIDITY ✓

DRY ✓

DUSTY ✓

MARKED TEMP CHANGES ✓

OTHER ✓

REMARKS

SIGNATURE BY EXAMINING PHYSICIAN

/s/ [Illegible] (M.D. OR D.O.)
(Physician)

CARLOS M. LIANES, M.D.
([illegible])

203 E. Polk
(Address)

Livingston, Tx. 77351

10-9-79
(Date of Signature)

*ALL INFORMATION IS TO BE TREATED AS CONFIDENTIAL AND TO BE USED ONLY IN THE ADMINISTRATIVE PROCESS OF REHABILITATION OR DISABILITY. DETERMINATION AS REQUIRED TO ACCOMPLISH THESE PURPOSES.

EXAMINEE HAS THE LEGAL RIGHT TO SEE THIS REPORT IF HE/SHE SO REQUESTS.

VOCATIONAL REHABILITATION DIVISION
OF THE
TEXAS REHABILITATION COMMISSION

[SEAL]

207 N. Houston
Livingston, Texas 77351

PSYCHOLOGICAL REPORT SUMMARY

Name: PENRY, Johnny P.
Date of Birth: 5/5/56
Age: 23
Date of Testing: 9/18/79

Referral: Jackie Tims
Counselor-TRC

REASONS FOR REFERRAL:

1. Diagnosis for determination of mental disorder.
2. To obtain data to assist in personal and vocational guidance and counseling.
3. To determine level of intellectual functioning and academic achievement levels.

BACKGROUND INFORMATION AND SOCIAL HISTORY:

Johnny was able to provide very little background information in regard to his early social history. He did, however, indicate that his mother took him out of school before he finished the first grade and he has received no further formal schooling. It should be noted that Johnny appears to be functioning within a mild to moderate range of mental retardation resulting in poor long-term memory and this inability to recall social history.

Johnny is single and presently lives with his aunt whom he is totally dependent upon for support. In talking with the counselor in this case, I learned that Johnny's mother has in the past had mental problems and that this has resulted in Johnny's living with his aunt. Again, Johnny could provide very little information about his family relationships except to say that he liked working with his father who ran an auto body shop. It should be noted that Johnny's social history as obtained through TRC Case Records also indicates that Johnny's mother and father apparently neglected and abused Johnny in the past and that they show no interest or concern for him at this time.

Johnny was convicted for rape in February, 1977 and received a five-year confinement at TDC. He served three of these five years and was released on parole. In addition to his conviction for rape, Johnny has in the past been charged with arson on two occasions, but apparently was not convicted. Johnny indicated that he had learned his lesson by his confinement at TDC and did not want to become involved in any behavior that might send him back. It should be noted that Johnny reports that he had a very hard time while at TDC and was often beat up by other inmates and by the guards. Johnny indicated that many of his fights were the result of his refusal to let anyone push him around which suggests that his attitude may have played a major role in his difficulties.

Vocationally, Johnny can relate very little occupational experience and indicates that his only job lasted for approximately four weeks and was as busboy at a local restaurant. Johnny feels that he has been unable to find employment since his release from TDC due to discrimination against ex-convicts. Johnny indicated that he lost

his one and only job because of lack of transportation, at the time of evaluation, Johnny expressed a vocational interest in becoming employed in filling station or auto body work. Johnny reports no health problems that would be either physically or vocationally limiting for him.

BEHAVIORAL OBSERVATIONS:

Johnny exhibited good cooperation and effort while in testing and appeared to be working to the limit of his ability on all tasks presented. He exhibited an average amount of activity with fairly constant tempo and good motor coordination. Johnny appeared to be shy and somewhat reserved and carried on very little spontaneous conversation. He expressed himself using phrases or very short sentences and maintained poor eye contact while conversing. He exhibited no excessive self-criticism and his attention to and understanding of problems and instructions was below average and he frequently required elaboration in that area. Due to consistent effort by the client and lack of problems in test administration, however, all scores appear to be valid.

INTELLECTUAL FUNCTIONING:

Johnny has achieved a verbal scale IQ on the Wechsler Adult Intelligence Scale of 56 which falls within a mild range of mental retardation according to the Diagnostic and Statistical Manual. The standard error of measure for the verbal section of the test is three; therefore, Johnny's verbal scale IQ is likely to fall between 53 and 59 sixty-eight percent of the time. He has achieved a dull, normal

classification of functioning in his general alertness to environment, range of education and information gained over time and exposure to environment, ability to assimilate facts, ability to use common sense judgment and reality testing and in his ability to evaluate past experiences. He has achieved a borderline mental defective classification of functioning in his ability to show mental alertness, concentration and reasoning in doing calculations in practical arithmetic, ability to utilize rote memory, control of attention and immediate recall and in his ability to assimilate and use words meaningfully. He has achieved a mental defective classification of functioning in his ability to develop concepts from a concrete and functional level to a higher level. All scores on the verbal section between subtests fall within a normal four point range. Johnny has achieved a performance scale IQ on the Wechsler of 72 which falls within a borderline range of mental retardation according to the Diagnostic and Statistical Manual. The standard error of measure for the performance is four; therefore, Johnny's performance scale IQ is likely to fall between 68 and 76 sixty-eight percent of the time. He has achieved a dull, normal classification of functioning in visual memory and motor coordination and capacity to take new simple learning tasks in stride, ability to analyze wholes into their component parts and planning abilities, comprehension of total situations and general alertness in social situations and in his ability to work toward an unknown goal and persist at a task requiring neuro[illegible] control and visual motor planning. He has achieved an average classification of functioning in his conceptual and perceptual abilities and ability to discriminate essentials from nonessentials. All scores on the performance section between subtests also

fall within a normal four point range. Johnny has achieved a full scale IQ on the Wechsler of 61 which falls within a mild range of mental retardation according to the Diagnostic and Statistical Manual. The critical ratio of fifteen between the verbal and performance sections of the test was exceeded by one point with the higher score being on the performance section of the test. This difference between the verbal and performance scale IQ's more than likely reflects Johnny's lack of educational opportunities, as well as his general mental retardation. It should be noted that Johnny's capacity for associative thinking is very limited; therefore, Johnny is likely to be very concrete in his thinking. He also exhibits very poor expressive language skills and abstract thinking abilities. These deficits in abstract and associative thinking and poor verbal concept formation result in very poor long-term memory. In addition to his problem with long-term memory, Johnny is very likely also to have a very poor short-term memory. This problem is the result of poor ability for attention and concentration, as well as poor ability to manipulate thought patterns. In addition to deficits in long and short-term memory as indicated above, Johnny exhibits a very limited word knowledge and poor ability to integrate experiences and evaluate them in socially acceptable ways. It should, however, that Johnny's test scores do indicate average alertness in visual observation and attention to detail. His ability for visual motor and fine motor coordination and his ability to see part-whole relationships appear to be within a dull, normal range. The Bender Motor Gestalt Test indicates impairment of cognitive functioning and Johnny has achieved grade norm scores on the Wide Range Achievement Test of *1.7 in reading, 2.2 in spelling and kg. .8 in*

arithmetic. All scores fall within a defective classification of achievement as measured by that test for his age. It should be noted, however, that when standard scores from the Wide Range Achievement Test are compared with IQ's as measured by the Wechsler Adult Intelligence Scale, Johnny appears to be achieving at or near his expected level according to his IQ and age. In addition to a measured *full scale IQ of 61*, Johnny lacks ability to apply basic academic skills to daily life activities, has exhibited inappropriate reasoning and judgment in daily life activities, has not mastered basic social skills which would allow successful participation in group activities and interpersonal relations, is unable to function independent within the community and in gainful employment and has exhibited an inability to conform to standards set by the community.

WIDERANGE ACHIEVEMENT TEST

	Raw	Grade	Percentile	Standard
Reading	18	1.7	.7	59
Spelling	6	2.2	.9	67
Arithmetic	7	Kg.8	.2	54

WECHSLER ADULT INTELLIGENCE SCALE

TEST	RAW SCORE	SCALED SCORE
Information	4	4
Comprehension	7	4
Arithmetic	3	3
Similarities	0	0
Digit Span	6	2
Vocabulary	9	2
	VERBAL SCORE	15

Digit Symbol	21	4
Picture Completion	10	8
Block Design	16	5
Picture Arrangement	14	6
Object Assembly	20	6
PERFORMANCE SCORE	29	

VERBAL SCORE	15	IQ	56
PERFORMANCE SCORE	29	IQ	72
FULL SCALE SCORE	44	IQ	61*

*61 Circled on original.

PERSONALITY DYNAMICS:

Personality testing and social history indicates that Johnny tends to be unconventional and unconcerned over everyday matters and will be unsteady in purpose. He is also apparently lacking in super-ego strength, that is, Johnny tends to feel few obligations, will tend to evade rules and will tend to follow his own urges with very little regard for social demands. His freedom from group influences may result in anti-social acts, as well as difficulties which involve rapid action with insufficient consideration and thought.

In general, Johnny may be characterized as being an individual who has very poor coordination between body drives and intellectual control, resulting in the presence of many unsatisfied drives. He also tends to be overly defensive in inter-personal relations and may tend to protect himself from anticipation from hurt from others through aggressive acts.

DIAGNOSIS: *Mild mental retardation with anti-social tendencies*

DSM II CODE: 311

FUNCTIONAL LIMITATIONS:

1. Lack of academic skills in reading, spelling and arithmetic.
2. Lack of vocational experience.
3. Very limited ability for associative thinking, resulting in poor long-term memory.
4. Poor ability for attention and/or concentration.
5. Overly defensive attitude may interfere with ability to maintain interpersonal relations and to accept supervision.
6. Impulsiveness and freedom from group influences may result in anti-social acts, and vocational unreliability.
7. Low intellectual functioning will interfere with ability to learn job skills.
8. History of incarceration at TDC will interfere with ability to find employment.

SUMMARY AND RECOMMENDATIONS:

It is felt that Johnny will continue to need close supervision, both in personal affairs, as well as in a vocational setting. It is also felt that without such supervision, Johnny may tend to violate the stipulations of his parole. Recommendations include:

1. Individual counseling through the local MHMR Outpatient Clinic.
2. Continued close supervision by his parole officer, if possible.
3. Vocational guidance and counseling.

/s/ Tim L. Monroe
Tim L. Monroe, M.S., Psychologist
Texas Rehabilitation Commission

10/09/79

/sm

TEXAS REHABILITATION COMMISSION

Referral for Psychological Evaluation

TO Tina Monroe
Name of Psychologist/Evaluator

Tests Requested Full Battery ____
Routine Battery ✓ Other ____

If additional or substitute tests are needed, include an explanation on the evaluation report

FROM Jacquelyn Tims, 207 N. Houston
Livingston Texas 7735
Counselor, TRC Office, Address and Phone Number

DATE and time client is scheduled for evaluation
Tuesday, September 18, 1979 at 1:00 P.M.

I. FOCUS OF EVALUATION

A. Reason for referral.

✓1 Diagnosis for determination of mental disorder (if appropriate)

_2 To obtain data to assist personal counseling

✓3 To obtain data to assist in vocational counseling and guidance

B. Special question(s) to be answered by the psychological evaluation.

_____

_____

_____

II. CLIENT INFORMATION

A. Penry Johnny P. 23 White
Name Last First Middle Age Race

[Illegible] 007/97/2381 "02" Applicant
Location Soc. Sec. No. R Status (Describe)

Speaks [✓] English [ ] Spanish Reads [✓] English [ ] Spanish

B. Vocational objective(s) under consideration if any,

a. _____

b. _____

C. Current Disabilities

	Suspected	Reported	Established
a. Mental Retardation Mild	_____	_____	_____
b. _____	_____	_____	_____
c. _____	_____	_____	_____

D. History of client includes:

___	Accident [illegible]	___	Illegitimate pregnancy
___	Attempted suicide*	✓	Incarceration
___	Brain damage or other neurological disorder*	___	Irregular discharge from the armed services*
___	Broken home	___	Misconduct in school*
___	Chronic employment instability	___	Neurotic behavior*
✓	Chronic or acute familial discord*	___	Physical disability*
✓	Chronic school failure	✓	Placement in special education classes or school for exceptional children*
✓	Criminal behavior*		
___	Receipt of public assistance	___	Prostitution
___	Divorce or separation	___	Psychotic behavior*
___	Drug or alcohol abuse or addiction*	___	Receipt of psychotherapy*
___	Hospitalization for psychiatric disorder*	___	Receipt of social security benefits*
		✓	Sexual deviation*
		___	Other _____

* * *

E. Factors which might affect testing (suspected or established)

✓	Illiteracy	___	Medication effects
___	Impaired vision	___	Resentment of testing
___	Impaired hearing	___	Other (Describe)____
___	Fear of testing		

_____

* * *

_____

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

* * *

[47:962] peaceful and law-abiding?

A Yes.

BY MR. SMITH:

Objection, Your Honor. Can I approach the bench?

BY THE COURT:

Make your objection.

BY MR. SMITH:

Objection to violation of constitutional rights, and the right of confrontation.

BY THE COURT:

Overrule the objection. You can answer the question.

Q Are you familiar with that reputation?

A Yes.

Q Is that reputation good or bad?

A Bad.

Q Are you familiar with his reputation in that community for being assaultive?

A Yes, I am.

Q Is that reputation good or bad?

A Bad.

Q Are you familiar with his reputation in that community for being dangerous?

A Yes, I am.

[963] Q Is that reputation good or bad?

A Bad.

Q Did you have personal contact with him during your years at Ellis One?

A Yes, I did.

Q Based upon your personal knowledge of him, your personal dealings with him, do you have an opinion, as to his character for being peaceful and law-abiding?

BY MR. SMITH:

Same objection, Your Honor. Further objection, improper under the Rules of Evidence.

BY THE COURT:

Objection is overruled.

Q You have an opinion?

A Yes, I do.

Q Is that opinion good or bad?

A Bad.

Q Do you have an opinion based upon your knowledge and dealings with him as to whether he is an assaultive person?

A Yes.

BY MR. SMITH:

Objection, Your Honor. Not proper subject for opinion evidence.

[964] BY THE COURT:

I think you have already asked that question on reputation.

BY MR. WEEKS:

I asked it on reputation. I am asking personal opinion now, same characteristic Your Honor.

BY THE COURT:

I am going to sustain his objection to that.

Q Did you have an opportunity while you were at Ellis One –

BY MR. SMITH:

May I request a jury instruction, Your Honor?

BY THE COURT:

Disregard the last question that Counsel asked this witness.

BY MR. SMITH:

And, I move for Mistrial?

BY THE COURT:

Motion for Mistrial is denied.

Q During your dealings with Mr. Penry at the Ellis One Unit, did you have an opportunity to talk with him?

[965] A Yes, I did.

Q Were you able to communicate with him?

A Yes, I was.

Q Was he able to communicate with you?

A Yes, he was.

Q Could he make himself understood to you?

A Yes, he could.

Q Did you have any problem making yourself understood to him?

A No, I didn't.

Q Was he able to understand the rules of the institution?

A Yes, he was.

Q Okay. In dealing with him, do you know whether he can read or write?

A Yes.

Q Can he?

A Yes, he can.

Q Did you see him read things and write things?

A Yes, I have.

Q And, was this on a pretty regular basis while you were there?

A Yes, it was.

Q Did you notice him change in his behavior, his ability to understand you and his ability to read [966] or write while he was at Ellis One?

A You want my opinion?

Q Yes, Sir.

BY MR. SMITH:

Objection, Your Honor.

BY THE COURT:

You all approach the bench, just a minute.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. WEEKS:

I can probably ask based upon his behavior if he knows.

BY THE COURT:

Okay. Your objection?

BY MR. SMITH:

I didn't get what he said.

BY MR. WEEKS:

I said, I will ask him if he personally noticed a change in his behavior, personally observed it.

BY MR. SMITH:

He said, do you want my opinion, and you said yes. It is an objection to the [967] lay opinion, if he saw something.

BY THE COURT:

The objection is sustained, as to opinion. You can restate your question.

(END OF CONVERSATION HELD AT THE BENCH.)

Q Based upon your observations of him, during your period there, did you see a change in his behavior concerning his ability to understand you and to read and write?

A Yes, I did.

Q When did that change come about?

A That change took place during the time when they started getting a hold in regard to him being mentally retarded.

Q And, what was the change that you saw in his behavior?

A At this particular point, I would say, that, he had a problem understanding, what I mean by understanding asfaras reading and writing, or even just having a verbal confrontation with him.

Q And, this was different than his behavior you observed in him in years previous?

A That's right.

Q. About how long ago was the change in terms of years?

[968] A I would have to say somewhere in '89.

Q Based upon your knowledge of him and dealings with him while you were at the Ellis One Unit, from 1986 to 1989, can you state in your opinion, whether there is a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society?

BY MR. SMITH:

Objection.

BY THE COURT:

Do you have any response to the objection?

BY MR. WEEKS:

Our response would be again, that this man has dwelt with him, opinion testimony, is allowed under the Rules of Evidence. I think this man has a long history of dealing with him.

BY MR. SMITH:

I think we need to approach.

BY THE COURT:

Approach the bench, just a minute, both of you.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

* * *

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

* * *

[47:978] time, is that the most maximum security area?

A That is the most maximum secured area in TDC in the State.

Q And, how long were you on Ellis One, and had contact with Inmate Penry?

A Both times?

Q Yes, Sir.

A Probably a two-and a half years of total time. Like I said earlier, I was there, oh, from September until October, actually of '82, until May of '84, and then, I came back in '86 as a captain, and I was there a year.

Q When you were there in '84, what was your rank at that time?

A In '84?

Q Yes, Sir.

A I was just a sargeant.

Q And, did you have the responsibility over the area that he was housed in?

A Right.

Q And, did your responsibility include assigning inmates to rec groups?

A Right.

Q Did an inmate have privileges take away, modified?

A In my capacity, I wasn't the one that put them on [979] restriction, that was a whole different process, but, in my authority, I could alter or lift or modify the restriction that they were on, whether it be, recreation time privileges, commissary purchases, just things like that, and I did, I did have the responsibility of putting inmates in particular rec groups.

Q So, you were familiar with all the inmates in that area?

A That was my responsibility.

Q Did you have personal contact with Inmate Penry?

A Yes.

Q On many occasions?

A Yes.

Q Did you have conversations with him?

A Yes.

Q Did you have any trouble understanding him?

A No.

Q Did he appear to have any trouble understanding you?

A No.

Q If he didn't understand something, did he ask you about it?

A Oh, yes. If he didn't understand whatever it was we were talking about at the time, maybe [980] he doesn't understand the circumstances or the situation, he would ask, yes.

Q And, did you have dealings with him in terms of him obtaining privileges?

A Yes.

Q Did he barter with you?

A Well, yes, because like I said, he would approach me on numerous occasions about maybe he was on restriction for thirty days or sixty days, where he had lost his privileges, to recreate, and he may come to me and say, if I don't get in any trouble, for two weeks or three weeks or whatever, could I go to recreation, or could I go to the store, if I show you that I won't get in any trouble for a couple of weeks, and I will be good you know, that type of barter system, which happens, you know, on numerous times.

Q And, would he be able to conform his behavior and follow through on the bargain he made?

A Well, he would make an attempt at some point, but sometimes, he fell a little bit short of maybe the expected behavior.

Q And, are you very careful about who you recreate together?

A Yes. This was part of my duties to divide these [981] particular inmates up into groups of – different size

groups of them, may vary from six or eight or ten to twelve or fifteen, and that was my responsibility, to put them in recreation groups where they would be compatible with one another. Maybe there was such things considered as gang membership, or affiliation or just personality conflicts, and I would have to consider those facts on who is assigned to an inmate rec group.

Q Did you have any problem in getting Penry assigned to a rec group?

A Did I have a problem?

Q Yes.

A Well, yes, it was of concern at times, because at times, Penry would have disagreements or falling outs with certain people in this group, and, then, I would have to alter his group, because of his inability to function with these other inmates, at times.

Q Would you describe him as an aggressive or non-aggressive inmate?

A Well, he was an aggressive inmate, that is my opinion.

BY MR. SMITH:

Objection, Your Honor.

[982] BY THE COURT:

Overrule the objection.

Q Are you familiar with his reputation?

A Yes.

Q In the community which he lived at that time?

A At Ellis, yes, I was.

BY MR. SMITH:

Your Honor, can we have a running exception to this?

BY THE COURT:

Objection is overruled.

Q Are you familiar with his reputation for being peaceful and law-abiding?

A Yes.

Q Is that reputation good or bad?

A Bad.

Q Were you familiar with his reputation for being assaultive?

A Yes, I am.

Q Is that good or bad?

A Bad.

Q Are you familiar with his reputation for being a dangerous inmate?

A Yes, I am.

Q Is that good or bad?

[983] A Bad.

Q And, did you have an opinion based on your personal knowledge of John Penry, and your dealings of him over these years, and knowledge of him, as to

whether there is a probability that the Defendant would commit criminal acts of violence to constitute a continuing threat to society?

A Yes.

BY MR. SMITH:

Objection.

BY THE COURT:

Overruled.

Q What is that opinion?

A I believe he most definitely would.

Q Thank you, Sir.

BY MR. WEEKS:

Pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. SMITH:

Q In that incident with Santana, Officer Selman, they were in separate cells, correct?

A Yes. The inmates were housed in separate cells.

Q And, Santana was able to step back and get physically out of reach from Penry on that occasion, right?

* * *

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

* * *

[47:993] FRANK BRAGG

called as a witness by the State, having first been duly sworn to tell the truth, testified on his oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. PRICE:

Q State your name to the jury, please, Sir?

A Frank Bragg.

Q What is your occupation or profession, Mr. Bragg?

A I am a Deputy Sheriff of Trinity County.

Q How long have you served as a Deputy Sheriff over in Trinity County?

A About fifteen years.

Q Were you Deputy Sheriff over in Trinity County back in 1980?

A Yes, Sir, I was.

Q And, at that time, did you come to know a person by the name of Johnny Paul Penry?

A Yes, I did.

Q Do you see him seated here in the Courtroom today?

A Yes, Sir, I do.

Q Okay. And, could you point him out to the Judge and the jury, please?

A Right there between this lady and that guy.

[994] BY MR. PRICE:

Your Honor, may the record reflect that he has identified the Defendant?

BY THE COURT:

The record will reflect that the witness has identified the Defendant.

Q Mr. Bragg, in your capacity of a Deputy Sheriff there in Trinity County, did you have occasion to come in contact with the inmates that are kept there in the Trinity County Jail?

A Yes, Sir, I did.

Q Did you have occasion to come into contact with in the latter part of 1979 or early part of 1980, with Johnny Paul Penry, while he was there?

A Yes, Sir, I did.

Q Okay. Did you ever have occasion to carry on a conversation with him?

A Not extensive, but, Yes, Sir.

Q But, you would have occasion to talk to him from time to time?

A Yes, Sir.

Q Did you ever have any problem communicating with him?

A No, Sir, I didn't.

Q Did you ever have any problem with understanding [995] him?

A No, Sir, I didn't.

Q Did he ever appear to have any problem understanding you?

A No, Sir, he didn't.

Q Were you in Court in Groveton, Texas, on or about April 1, 1980, when Mr. Penry was also present in the court over there?

A Yes, Sir, I was.

Q And, specifically, were you present when the Judge, in a judicial proceeding over there read a verdict in which the jury had just returned concerning Mr. Penry?

A Yes, Sir, I was.

BY MR. SMITH:

May I approach, Your Honor?

BY THE COURT:

Okay. You can approach the bench.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

Your Honor, this is, I now understand the purposes of this witness is to try to get before the jury in an indirect way, the

* * *

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

* * *

[47:1003] Justice?

A Approximately eight years.

Q Where did you start your employment with them, what unit?

A Ellis One Unit.

Q What year was that?

A 1982.

Q And, how long did you stay at the Ellis One Unit?

A Until August, 1989.

Q What was your rank when you started?

A I was a Correctional Officer One.

Q What was your rank when you left?

A Lieutenant.

Q During the time that you were on the Ellis One Unit, did you come to know an inmate by the name of Johnny Paul Penry?

A Yes, I did.

Q If he is in the Courtroom, would you point him out and describe how he is dressed?

A Yes, Sir. Looks like he has on a light blue shirt and dark blue pants, and sitting at that table.

BY MR. WEEKS:

May the record reflect that he has identified the Defendant?

BY THE COURT:

[1004] The record will reflect that he has identified the Defendant.

Q In the period of time that you were at the Ellis One Unit, did you have few or many occasions to come into contact with Inmate Penry?

A Many occasions.

Q And, did you have conversations with him?

A Yes, Sir, I did.

Q Did you have any trouble understanding him?

A No, Sir.

Q Did he have any trouble understanding you?

A No, Sir.

Q You know whether he can read or write?

A I have seen him write and I have seen that he has books in his cell, and I have seen him looking at books.

Q Does he know the difference between right and wrong?

A Yes, Sir.

BY MR. SMITH:

May we approach on that, Your Honor?

BY THE COURT:

Yes, Sir.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING [1005] CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

Your Honor, there is no issue, there is no claim here that he didn't know the difference between right and wrong that needs to go to the jury, dating back to it, or a difference in right or wrong, and retardation in this, between right and wrong, violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution, Texas Constitution and the Code of Criminal Procedure.

BY THE COURT:

Any response?

BY MR. WEEKS:

Our response would be that I think it is very relevant whether he knew the difference between right and wrong, and goes to understanding the charges against him, and goes to a claim of mental retardation.

BY THE COURT:

I am going to overrule the objection. You can ask the question.

[1006] BY MR. WEEKS:

I think it has been asked and answered, Your Honor.

BY THE COURT:

Okay.

(END OF CONVERSATION HELD AT THE BENCH.)

Q How long were you a CO3, basic corrections officer, there at Ellis One?

A From 1982 to 1985.

Q What rank did you obtain in 1985?

A Sargeant Corrections Officer.

Q And, how long were you a sargeant?

A Two and a half years.

Q As sargeant, did you have a supervisor's position, in the area in which Inmate Penry was housed?

A Yes, Sir, I was the sargeant in the maximum security cell block area.

Q And, as a sargeant, were you responsible if there were problems with inmates?

A Yes Sir, any time an officer would have a problem with an inmate, he would bring it to my attention and I would handle it.

Q And, did you have occasion to come into contact with Inmate Penry, on numerous occasions during that time?

[1007] A Yes, Sir.

Q And, are you familiar with his reputation in the community in which he lived there at the Ellis One Unit?

A Yes, Sir.

Q And, are you familiar with his reputation for being peaceful and law-abiding?

A Yes, Sir.

Q Is that reputation good or bad?

A Bad.

BY MR. SMITH:

Make the objection that we made previously, re-urge it Your Honor.

BY THE COURT:

Objection overruled.

Q And, you are familiar with his reputation for being peaceful and law-abiding?

A Yes, Sir.

Q What is that reputation, good or bad?

A Bad.

Q Are you familiar with his reputation in that community for being assaultive?

A Yes, Sir.

Q Is that reputation good or bad?

A Reputation is correct, he is assaultive.

[1008] Q And, drawing your attention, are you familiar with his reputation for being dangerous?

A Yes, Sir.

Q Is that reputation good or bad?

A It is correct, it is he is dangerous.

Q Would that reputation be bad?

A Yes, Sir.

Q Now, based upon your extensive dealings with him over the years, you were at the Ellis One Unit, that would be what, seven or eight years?

A Yes, Sir.

Q And, your knowledge of Johnny Paul Penry, do you have an opinion, that there is a probability that Johnny Penry would commit criminal acts of violence that would constitute a continuing threat to society?

A Yes, I do.

BY MR. SMITH:

Objection, Your Honor.

BY THE COURT:

Objection overruled.

BY MR. SMITH:

Can I have a running exception on this?

BY THE COURT:

* * *

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

* * *

[47:1048] CLAYTON MALONE

called as a witness by the Defendant, having first been duly sworn to tell the truth, testified on his oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. SMITH:

Q Good afternoon. I am sorry that we caused you to be dragged here, but, you understand that we are doing our job. You are an attorney, correct?

A Yes, Sir.

Q And, you were appointed by the Court to represent Johnny Penry in a rape case in 1977?

A Yes, Sir.

Q Do you have an independent recollection today of the State on which you were appointed, Sir?

A Yes, Sir. I was appointed the first time, I believe in April of '77.

Q And, is that, of your independent recollection, you understand the words independent recollection?

A Well, you maybe had better define that.

Q Okay. If I asked you the same question last week, at this time, would you have known it was April of '77?

A I have, since receiving the subpoena, I have gone [1049] to the Courthouse and looked at the official records to be certain of my memory, and it didn't disagree.

Q Okay. And, I am going to ask the reporter to mark a document that I am handing as Exhibit One for the purposes of this hearing.

REPORTER'S NOTE: (WHEREUPON EVIDENCIARY HEARING DEFENDANT'S EXHIBIT NUMBER ONE WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q I'm sorry I don't have copies, but, I didn't know there was going to be a hearing when I came to Court today.

BY MR. SMITH:

Do you have that document?

BY MR. PRICE:

I got it.

Q Is that the record that you looked at, Mr. Malone?

A Yes, Sir, in addition to another case. This is part of the records that I looked at.

Q You looked at a different record, too?

A Yes, Sir.

Q Can you describe that other record, please?

A There were in that particular matter, there were [1050] two indictments, an earlier one, an earlier indictment, and that particular indictment.

Q The one that I just showed you is Cause Number 9886. There was also a 9885?

A Yes, Sir.

Q And, you say that you looked at the document, 9885, in the 9885 file that you were appointed in April?

A Yes, Sir.

Q Do you have that file with you today?

A No, Sir, I do not.

BY MR. SMITH:

May I ask, Your Honor, if the District Attorney has such document, that he would show it to me?

BY THE COURT:

Yes, Sir.

BY MR. PRICE:

(Showing to Mr. Smith).

BY MR. SMITH:

I am going to ask the reporter to mark this collection of documents that I just borrowed from the District Attorney as Defendant's Exhibit Two for the purposes of this hearing.

[1051] REPORTER'S NOTE: (WHEREUPON EVIDENCIARY HEARING DEFENDANT'S EXHIBIT NUMBER TWO WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q Is Defendant's Two the document that you were just talking about, Mr. Malone, some part of Defendant's Exhibit Two?

A Yes, Sir.

Q Can you show me the part where it showed you were appointed in April?

A I don't believe this is the complete file on it. This doesn't reflect it.

BY MR. SMITH:

Joe, do you have something that does?

BY MR. PRICE:

Reflects what?

BY MR. SMITH:

Something from the file, 9885, that reflects Mr. Malone was appointed in April.

BY MR. PRICE:

I didn't cover it to you for that purpose.

BY MR. SMITH:

Well, I just asked the witness. I am giving Mr. Price back Exhibit Number Two.

[1052] Q You are saying now, lets get it straight, Mr. Malone. You are aware there were two different files, 9886 and 9885, is that correct?

A Yes, Sir.

Q And, you are saying that there is something in the earlier file that shows the date of the appointment in April?

A I was appointed in April, because there is something else in the file that shows a medical examination or psychiatric examination of Mr. Penry. If you have the entire file, I will take a look at it and show you what I looked at.

BY MR. PRICE:

May I offer –

BY MR. SMITH:

Why doesn't Mr. Price do that. And, can I look over his shoulder while he is doing that?

BY MR. PRICE:

I would like to have both of these marked, 9885. Are you going to offer that as Defendant's Exhibit Number Two?

BY MR. SMITH:

Not offering it yet, anyway.

BY MR. PRICE:

[1053] Why don't you mark these State's Exhibit One and Two and I will offer them. They are certified copies of all of the documents in those two case numbers.

REPORTER'S NOTE: (WHEREUPON EVIDENCIARY STATE'S EXHIBITS NUMBERS ONE AND TWO WERE MARKED FOR IDENTIFICATION BY THE REPORTER.)

BY MR. PRICE:

Judge, for the purposes of the record we would offer into evidence State's Exhibit Number One, for the purpose of this hearing, which is the certified copy of the documents contained in Cause Number 9885, State of Texas vs. Johnny Paul Penry in the District Court of Polk County, Texas; and State's Exhibit Number Two, which is a certified copy of all of the documents in Cause Number 9886, State of Texas vs. Johnny Paul Penry, in the District Court of Polk County, Texas.

BY MR. SMITH:

Purerly as a matter of form, Judge, I am happy to use these with the witness [1054] now. I think we should hold this over until the State's case. I was just questioning the witness.

BY MR. PRICE:

I will offer them later.

BY MR. SMITH

I do want to pause and look through them carefully and I will do that, I am sure they are probably going in.

Q Take a look at State's Exhibit Number Two, Mr. Malone and see if you can find the document that you are talking about, that shows that you were appointed in April.

A Yes, Sir, the docket sheet reflects that entry was made that I was appointed in April.

Q Show me where that is?

A (Witness indicating).

Q You are quite right, because I pointed to the wrong exhibit, State's Exhibit Two, is a file of 9886, isn't it?

A Yes, Sir.

Q And, what you just pointed out to me is a copy of a page, or a copy of the Defendant's One, which I already showed you, right?

A Yes, Sir.

[1055] Q Take a look at State One, which is also Defendant's Two. Why do we do this to each other? And, see if you can find anything in there that shows that you were appointed in April?

A No, Sir, I don't see a docket entry.

Q Okay. The point I am just trying to make Mr. Malone, if you disagree with me, say so. Is that two indictments and there is nothing in the file of the first one that shows you being appointed at all?

A No, Sir, but that –

Q Okay. I'm not through. I'm not through. I don't want to get you to say any more. Asfaras the file of the first of those two indictments, no record that you were ever appointed, true?

A That's true.

Q Okay. And, what date was the second indictment filed, Sir?

A Sir?

Q Look at the records in front of you and tell me when the second indictment was filed. I think the first page of Exhibit Two will tell you.

A The second indictment was returned on May 5th, '77.

Q Okay. So, you say you were appointed, the first [1056] indictment was still pending before the second indictment, right?

A Yes, Sir.

Q Nothing in the first indictment in the file that shows that?

A No, Sir.

Q Okay. Now, look at the document that does show your appointment, which is the first page of – well, I won't fool around, the first page of State's Two, you agree with me, that document was originally created sometime around May 5, '77, or later, because that was when the indictment was filed, right?

A Yes, Sir. That is when the second indictment was filed, on May 5, 1977.

Q And, there are a lot of – not a lot, but, there are three entries on that docket, right?

A Yes, Sir.

Q And, the dates?

A Yes, Sir.

Q And, what is the date of the first one?

A The date of the first one is July 14th, '77.

Q Okay. And, do you know from your experience, of the courts around here, whether on a docket you normally right down the first entry on the [1057] top and then the second entry after, and the third entry after that?

A Judge Earnest Coker, Sr., is the one who was the judge in the matter, and apparently, he was combining both cases on his docket entry. I would have no other explanation for it.

Q Well, just so His Honor understands the point that I am making, before you try to explain it, is it unusual for an April entry to come after a July entry?

A Oh, Yes, Sir.

Q This time the entry that seems to say 4/14/77 comes after the entry that says, 7/14/77, right?

A Yes, Sir.

Q And, one possible explanation of that is first, that it was a mistake and the second entry, 7/14/77, did that occur to you?

A Definitely occurred to me, but, it definitely is not.

Q How do you know that?

A Because I can tell you that by looking at wherever Dr. Peebles' report is, I can get around to tying it down exactly.

Q Good, go ahead.

BY THE COURT:

[1058] Mr. Smith what was your question to the witness, the last question?

BY MR. SMITH:

Well, he has volunteered, Your Honor, to find Dr. Peebles' report and tie it down, to prove where he was appointed.

A Dr. Peebles' report is reflected to have been done on May 19, 1977.

Q Yes, Sir. Is there something in there that tells you that you were appointed in April?

A Yes, Sir, because to this effect, that I had requested it, with an oral motion to the Court that this be done.

Q You remembering asking for a medical exam?

A Yes, Sir.

Q You are remembering that today, something that happened thirteen years ago, right?

A Yes, Sir, I have reviewed and looked at the doctor's report.

Q Uh-huh. Looking at any document today, that shows that you requested this?

A No, it was a verbal motion to the court.

Q You remember that verbal motion right now?

A Yes, Sir.

[1059] Q You say you reviewed the doctor's report. Did you review the second page of it? I am not going to make you read it all now, if you don't want to, Mr. Malone, but, referring to the next to the last paragraph on that page, you see that there?

A Repeat your question. I'm a little hard of hearing and I don't hear because of the distance. I don't hear to well.

BY MR. SMITH:

Shall I stand closer, Judge?

BY THE COURT:

That's fine with me.

A Sure would be with me.

Q Okay. Mr. Malone, coming through?

A Yes, Sir.

Q Look at the next to the last paragraph on Page 2 of Dr. Peebles' report. Got it?

A Yes, Sir.

Q What does it say?

A You talking about the last paragraph?

Q Next to the last.

A Next to the last. Alright.

Q What does it say, Sir?

A He believes this was in February, apparently that –

[1060] Q Read it first, then, you can explain.

A Of what occurred, but, he said he hadn't seen an attorney yet.

Q So, Johnny Penry told the doctor that he hadn't seen an attorney?

A Yes, Sir.

Q You say that wasn't true? Do you say that was not true?

A It wasn't true, if he is talking about before April 19th.

Q What is the date of the doctor's report?

A Doctor's report is May 19th.

Q And, does it show in there when he talked to Johnny Penry?

A I don't – somewhere around – No, Sir, I don't believe it does.

Q Do you know any reason for Johnny Penry to lie and to tell the doctor that he hadn't seen an attorney?

A Well, I wouldn't have any reason to know why Johnny Penry would do anything.

Q But, the report had to be written after you made the oral motion didn't it?

A Yes, Sir.

Q And, Dr. Peebles had to see him after you made [1061] your motion, didn't he?

A That would be my opinion, that he saw him after I made the motion, because up until that point, nothing had been done.

Q So, if Johnny Penry told Dr. Peebles when he saw him that he hadn't seen an attorney, that just wasn't true, right?

A No, Sir, it wouldn't be true.

Q Looking back, at State Two, where Judge Coker wrote what looks like 4/14/77, you are appointed?

A Yes, Sir.

Q You say that Judge Coker must have been combining something from an earlier file?

A That would be my assumption. Can't say for certain that occurred, but, that would be my assumption because I was appointed on the 9885 Case first.

Q And, why would Judge Coker do that on April 14th date?

A That was, other than, he may have made the notation to remind himself. I have no idea where he could have gotten it.

Q There is a place where the Judge normally makes a notation to remind himself when he has appointed Counsel, isn't there?

[1062] A Not necessarily with Judge Ernest Coker.

Q But, isn't it a pretty good idea when a Judge appoints Counsel, for him to note it in the docket?

A Most judges do that, Yes, Sir.

Q And, there is nothing in the docket of 9885, 9985 doesn't say anything about appointing you, does it?

A No, Sir, it sure doesn't.

Q Well, I am going to show you a page in State's Exhibit Two and let's see, I have to waste a minute counting. The eighth page from the back. I didn't want to count it from the back. The eighth page from the back. You see that?

A Yes, Sir.

Q And, you see Number Two there?

A Yes, Sir.

Q That is a Waiver of Preparation Time by Court Appointed Counsel, right?

A Yes, Sir.

Q And, you signed that on July – on the date in July, '77, right?

A That's true.

Q And, Johnny Penry signed it too?

[1063] A Yes, Sir.

Q You were waiving the ten days aloud for preparation trial in July of 1977, right?

A Yes, Sir.

BY MR. SMITH:

Now, Your Honor, I will agree at this point, what he states, State Exhibit Number One and Two into evidence.

BY THE COURT:

State's Exhibits One and Two are admitted without objection by agreement, for this hearing only.

Q Let me – well, I guess I am not quite through with Exhibit Two. Mr. Malone, can you find this Exhibit Two – no, that's improper.

A That's the one that you had.

Q That's the one that I had. There is a certificate of service. Is that in that file or not?

A You mean for my paycheck?

Q Yep. Let me – let me just ask one of these. Let me just ask the reporter to mark these that says Exhibit Three for this hearing a document that I am handing to him now.

REPORTER'S NOTE: (WHEREUPON EVIDENCIARY HEARING DEFENDANT'S EXHIBIT THREE WAS [1064] MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q Let me show you Defendant's Exhibit Three for the hearing. Is that where you put in your paycheck?

A Yes, Sir.

Q And, that is your signature?

A Yes, Sir.

Q And, you put – you got a hundred and fifty dollars right?

A Yes, Sir.

Q And, fifty dollars for what, court today, right?

A Yes, Sir.

Q Which day was that?

A That was the entry of the plea.

Q Make the oral motion for free?

A You don't understand Judge Coker. He paid for one day on a plea.

Q And, you got a hundred bucks for investigation, right?

A Yes, Sir.

Q What did you do with your hundred dollars?

A Well, I believe what I did was –

Q Maybe hold on. Okay. I'm sorry, go ahead.

A I believe that would have covered the motions and discussions with Mr. Penry.

[1065] Q Talk to any witnesses?

A Did I talk to any witnesses?

Q Yeah.

A Yes, Sir, I did.

Q What was their name?

A I don't recall.

Q What was your hourly rate at that time, back then?

A In 1977, it was probably fifty buck an hour.

Q Is the name Louis Milner familiar to you?

A Yes, Sir, he was the Deputy Sheriff that investigated the incident.

Q You interviewed him?

A I talked with Mr. Milner, Yes, Sir.

Q On this case?

A I am going to say, Yes, Sir, I talked to him about this case.

Q When did you do that?

A Prior to the entry of the plea.

Q How far prior?

A Don't recall that.

Q What did you say to him, what did he say to you?

A I don't recall that. I just ordinarly, the peace officers I knew real well, and they would let me look at their files, and I did.

Q You can't actually recite, here it is thirteen [1066] years ago, conversation with Mr. Milner, do you?

A No, Sir, No, Sir.

Q What about the name Sherlene Brown, is that familiar to you?

A Oh, Yes, Sir. She is the Sheriff's secretary.

Q Ever talk to her about the couch case or the Penry Case?

A No, Sir, I believe she notarized mayabe some of the statements.

BY MR. SMITH:

Your Honor, can I approach?

BY THE COURT:

Yes, Sir.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

I have to go into that man's prior suspension, but, I am not going to make a motion to Close the Courtroom.

BY MR. PRICE:

I am going to object to it, unless they have got some proof that his suspension and I have got a case by the Court of Criminal Appeals directly on point that says it is not relevant unless his suspension or whatever had to do with this case, and I don't think Mr. Malone –

BY MR. SMITH:

I am not saying that it had to do with this, but, I do claim that it was based on in-attention, repeat in-attention, to clients at the very time that we are talking about.

BY MR. PRICE:

You would have to show some relevance, to this case, and I have got the case to offer to Mr. Smith, and I don't want to embarrass him unnecessarily.

BY THE COURT:

I am going to not allow the offer at this time.

BY MR. SMITH:

Just forthe record, I would have shown that Mr. Malone had a drinking problem in 1977, and the problem led to in-attention to his cases, and I would ask that, including this one, I don't know what he did, but, it related to being suspended from practice as a [1068] result of inconsistence, one of which was that the Court of Civil Appeals noted that a matter that pending from February, 1974, Court of Criminal Appeals, and another matter pending in February of '74, to May of '77, the client said that he saw the attorney only twice.

BY MR. PRICE:

As long as it is clear on the record, I want Counsel to verify this, that first of all, do you not have anything that indicates his suspension in any way shape or form or fashion, had anything to do with his performance in the case of the State vs. Johnny Paul Penry, State's Exhibits One and Two?

BY MR. SMITH:

I am not going to stipulate to all of that, but, I do not claim that there is any mention of the Penry Case in any of the proceedings.

BY THE COURT:

Alright. You can proceed.

(END OF CONVERSATION HELD AT THE BENCH.)

BY MR. SMITH:

[1069] I will pass the witness.

BY THE COURT:

Mr. Price, do you have any questions of Mr. Malone?,

BY MR. PRICE:

Just a couple of questions, Your Honor.

CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Mr. Malone, the fact that your hourly rate may have been fifty dollars an hour, in 1977, whatever it was, did Judge Coker pay on the basis of whatever your hourly rate was?

A No, Sir. The attorney asked Judge Coker what he would pay if he had a particular case, and the Judge would state from the bench.

Q Pretty well tell you how much how much he was going to pay?

A Didn't make any difference if I spent two months on the case, it still would have been this figure.

Q I want to show you, – is it your testimony here today that you were, irregardless of what order the docket sheet entry may have been in, that you were appointed by Judge Coker for some [1070] time in April, 1977, to represent Johnny Paul Penry, is that your testimony?

A Yes, Sir.

Q And, is it also your testimony that you were first appointed to represent him in 9885?

A That's true.

Q And, that, carried over into 9886, is that correct?

A That's true.

Q Did you represent Johnny Paul Penry when he entered a plea of guilty in 9886 on, I believe July 25, 1977, is that correct?

A Yes, Sir, that's correct.

Q Did you represent him at that proceeding?

A Yes, Sir.

Q You had previously made a verbal motion to the Court to have the Defendant examined for competency and sanity, is that correct?

A That's true.

Q And, Judge Coker entered an order, I believe on May 5, 1977, is that correct?

A Yes, Sir.

Q That is part of State's Exhibit Number Two, is that correct?

A That's correct.

[1071] Q And, he was subsequently examined by Dr. Felix Peebles, at least the report is dated May 19th, 1977, is that correct?

A That's correct.

Q And, in that report, Dr. Peebles, found him to be competent to stand trial and sane at the time of the commission of the offense under Texas law, did he not?

A Yes, Sir.

Q With respect to the other plea papers contained in Cause Number 9886, which is now State's Exhibit Number Two, I want to direct your attention first of all to the document entitled, Stipulation of Evidence, which appears to be signed by Johnny Paul Penry and sworn to before the District Clerk of Polk County. Did Mr. Penry sign this stipulation of evidence?

A Yes, Sir, he signed the Stipulation of Evidence.

Q Did you go over it with him and advise him of what that document contained, what its contents were as well as what the legal effect of that document was before he signed it?

A Yes, Sir. I always tell the Defendants when I am reading that document to them, that this is [1072] a judicial confession.

Q Did he understand what that document was before he signed it, in your opinion?

A In my opinion, he understood it.

BY MR. SMITH:

Objection, Your Honor, beyond the scope of the Hearing.

BY THE COURT:

Objection is overruled.

Q I will show you a document that has got various signatures on it. The first is a waiver of the jury that purportedly is executed by you, Jerry Winfree and Johnny Paul Penry. Did you explain to Mr. Penry that he had a right to a jury trial?

A Yes, Sir, I explained that he had a right to a jury trial.

Q Alright. Who is Jerry Winfree?

A Jerry Winfree was Assistant District Attorney out of Conroe that tried the case.

Q Also, a Waiver of Preparation Time by Court appointed counsel, that Defense Counsel has just asked you about waiting ten days to prepare for trial. Your testimony had been that you had been appointed more than ten days prior to [1073] that?

A Yes, Sir, and I complete that in every plea that I take, even thoug, I may have been appointed two or three months, I still waive it.

Q The fact that you and Mr. Penry executed that Paragraph Two on that document, does not necessarily mean that you had just only been appointed in less than ten days prior, does it?

A No, Sir.

Q In fact, if that was the case, this plea was entered July 25th, which would have meant that you would have

to have been appointed sometime after July 15th, wouldn't it?

A That's true.

Q It shows it clearly that he was arraigned on July 14th, which was some eleven days prior to the time, is that correct?

A Yes, Sir.

Q Is it your testimony that it was not necessary to execute that particular waiver?

A That would be true.

Q Okay. The other signature here is on the waiver of ten days by a Motion for New Trial, and Mr. Penry signed that, and did you explain his rights in connection with that also?

[1074] A. Yes, Sir.

Q There is an admonishment, the next page contains what is entitled Admonishment, and it appears to have been signed by Judge Coker and also signed by you and Mr. Penry at the bottom. First of all, prior to the plea, did you go over the matters contained in this Admonishment with the Defendant?

A Yes, Sir.

Q And, during the plea itself, did Judge Coker, likewise admonish him to some five items contained on that document, there?

A Yes, Sir.

Q And were you satisfied that Mr. Penry understood those various admonishments, there specifically

dealing with, first of all, whether or not his plea is – "If your plea of guilty was prompted or influenced by any consideration, persuasion or illusion for hope or pardon, are you satisfied that he understood that?

A He understood that. Yes, Sir.

Q Did he understand the range of punishment being five to ninety-nine years or life?

A Yes, Sir.

Q The judgment is contained on Page – well, it is [1075] a later part of it here, but, ir any respect, did the Judge enter a judgment or sentence at that time, at least from the bench?

A Yes, Sir.

Q These are certified copies – what was the sentence?

A The sentence was five years for rape.

Q Okay. Was that a two count indictment?

A Yes, Sir, it was a two count indictment.

Q Okay. Would you look at the indictment in Cause No. 9886?

A Okay.

Q Did he plea guilty to the first count of that indictment?

A First count of the indictment, that is after it had been reduced to rape.

Q What happened with respect to the second count?

A The second count of the indictment was dismissed.

Q Was that part of the plea bargain?

A Yes, Sir.

Q Was that done on the record in Court?

A That would be in the records of the Court, Yes, Sir.

Q I mean, if it was done on the record, asfaras the Court reporter was concerned?

[1076] A Yes, Sir. The Court reporter.

Q Normally, in a plea, and in this particular case, was there a Court reporter there that took that plea?

A Yes, Sir.

Q Do you see Johnny Penry seated here in the Courtroom today?

A Yes, Sir.

Q Could you point him out to the Judge?

A Sitting by the lady there.

Q Is that the same Johnny Penry, the Defendant, in these two case numbers that you have been testifying to?

A. Yes, Sir.

BY MR. PRICE:

I pass the witness.

REDIRECT EXAMINATION

QUESTIONS BY MR. SMITH:

Q You told Mr. Price that you explained a lot of things to Mr. Penry around the time that he pled?

A Yes, Sir.

Q You actually remember giving those specific explanations specifically to this man at that time?

A Yes, Sir, because there was a lot of conversation [1077] between myself and Mr. Penry and also his uncle.

Q You are telling me that you remember today, July 11th, 1990, that back in July of 1977 you explained to Johnny Penry what a right to a jury trial was?

A Yes, Sir.

Q What did you say?

A I give my ordinary standard spill that I give to every person.

Q I know. I want you to tell me what you exactly remember saying to this man?

A After a considerable amount of consideration on the offer made on the plea bargain, and after that, he agreed to accept it. I then took the plea papers that are now here and went over each item on the page starting with the waiver, you have the right to a jury trial. If you sign these papers, you waive the right to a jury trial, and right on down the line.

Q Just to make it clear, I take it, your lawyer said something, I think he understands the difference. Are you

saying that you actually have a present recollection of saying that to Mr. Penry, or are you assuming it because it was a usual practice?

[1078] A I am not assuming anything.

Q You are saying that these are your present recollections of those conversations with Mr. Penry, right?

A Yes, Sir.

Q And, you also have the present recollection of the Judge saying that the second count is dismissed, right?

A Mr. Winfree made the motion that it be dismissed.

Q And, that is your present recollection, you remember those words being said in the Courtroom, right?

A Yes, Sir. The record will prove it, whatever. There was a record made.

Q Where is the record that proves it?

A Wherever the Court's records – or the court reporter records would be, I have no idea.

Q Are they in this room?

A I don't imagine they are.

Q What was the second count of the indictment, the one that eventually got dismissed? Was that part of the reason that you agreed to the plea?

A No, Sir.

Q In fact, the witnesses at that time weren't even there that day, were they?

[1079] A No, Sir.

BY MR. SMITH:

I will pass the witness, Your Honor.

BY THE COURT:

Does the State have any other questions of Mr. Malone?

RECROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q After the date of that plea, Mr. Malone, did you represent Johnny Paul Penry in that case or either one of those cases?

A No, Sir.

Q That is the end of it?

A. That was the end of the matter.

BY MR. PRICE:

No further questions, Your Honor.

REDIRECT EXAMINATION

QUESTIONS BY MR. SMITH:

Q One of the things that you accomplished from Mr. Penry was getting that second count dismissed right, Mr. Malone?

A No, Sir, I wouldn't say that was an accomplishment.

I would say that was part of the transaction of the plea bargain.

Q Wasn't it part of your job to make sure it got [1080] done?

A Yes, Sir.

Q Was it also part of your job to make sure that it got done in the Court's file?

A I didn't consider it a part of my job to be the court reporter, but, I can say this, when I – it was my job to get the best resolution of the charges that I could get Mr. Penry, and I think I did.

Q Try to address the question that I ask, Mr. Malone.

A Alright.

Q Was it part of your job to see that the dismissal got noted on the Court's file?

A In my opinion, the dismissal came when the judgment was entered.

Q Let me ask the question one more time, Sir. See if you can answer it yes or no. Wasn't it part of your job to see that the dismissal got noted on the Court's file?

A I would say that it would be part of my job, but, I don't read shorthand notes.

BY MR. SMITH:

Nothing further, Your Honor.

BY THE COURT:

[1081] Okay. You can step-down, Mr. Malone. Thank you.

Who is your next witness, Mr. Smith?

BY MR. SMITH:

Louis Milner.

BY THE COURT:

Call Mr. Louis Milner.

REPORTER'S NOTE: (WHEREUPON THE WITNESS, LOUIS MILNER WAS DULY SWORN IN BY THE CLERK.)

* * *

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

* * *

[47:1156] If I did this, do I have to stand or get one of the others repeated?

BY THE COURT:

On both of them, Yes, Sir.

BY MR. SMITH:

I still make the objection.

BY THE COURT:

Objection is overruled.

(END OF CONVERSATION HELD AT THE BENCH.)

Q You do have an opinion as to whether the Defendant, Johnny Penry, is peaceful and law abiding?

A Yes, Sir, I do.

Q Is that opinion good or bad?

A It is bad.

Q And, do you have an opinion as to whether the Defendant, Johnny Penry is assaultive?

A Yes, Sir, I do.

Q And, what is that opinion?

A I feel that he is assaultive.

Q Based upon your knowledge of him, your dealings with him, over that period of five years, do you have an opinion as to whether Johnny Penry is a dangerous individual?

A Yes, Sir, I do.

[1157] Q And, what is that opinion?

A I feel that he is dangerous.

Q Do you have occasion to talk with him on many occasions?

A Yes, Sir, I did.

Q Could you understand him in those conversations?

A Yes, Sir, I could understand him.

Q Could he understand you?

A He appeared to understand me at the time that I spoke.

Q Did he respond appropriately?

A Yes, Sir, he did.

Q And, you know whether he could read or write?

A I believe he can, yes.

Q And, he was housed in the maximum security area?

A He was housed in the most maximum security area in the prison.

Q Based upon your knowledge of him, do you have an opinion as to whether there is a probability that Johnny Penry would commit criminal acts of violence that would constitute a continuing threat to society?

A Yes, Sir, I do.

BY MR. SMITH:

We already made the objection, Your

* * *

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

* * *

[48:1079] be sworn in.

REPORTER'S NOTE: (WHEREUPON THE WITNESS WAS DULY SWORN IN BY THE CLERK.)

BY THE COURT:

Okay. If you will just have a seat right there and after you get seated that mic will move around. Sounds like you don't talk very loud, so, you need to pull it up and talk into it so everyone on the jury can hear you. Alright, ma'am.

BELINDA ANDERSON

called as a witness by the Defendant, having first been duly sworn to tell the truth, testified on her oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MRS. LIEB:

Q Please state your name?

A Sally Belinda Anderson.

Q Where do you live?

A Dickinson, Texas.

Q How old are you?

A I am thirty-one.

Q Are you married?

A Yes.

Q Do you know Johnny Paul Penry?

[1080] A Yes.

Q And, what is your relationship with him?

A He is my brother.

Q Are you older or younger?

A I am younger.

Q By how much?

A Two years.

Q Did you have another brother and sister?

A Yes.

Q Now, you have been convicted of a crime, is that right?

A Yes.

Q What was that?

A Burglary of a habitation.

Q Okay. And, in what county was that?

A It was Eighty-Two, Eighty or Eighty-Two.

Q And, how old were you?

A Probably about twenty, maybe.

Q Lets talk about Johnny and his growing up a little bit. Did Johnny go to school?

A Yes.

Q Do you know what grade he attended?

A First grade.

Q Did he attend school after that?

A Yes.

[1081] Q Well, lets go back to the first grade. Did he complete the first grade?

A No, he didn't.

Q He did not?

A He did not.

Q And, you said that thereafter, he went to school again?

A Yes.

Q And, where was that?

A Mexia State.

Q What is Mexia State?

A It is a school for the mentally retarded.

Q And, how old was Johnny there at Mexia?

A Close to fifteen, not quite sure on that, but, he was there a couple of years at least, the best I can remember.

Q When you say twelve or fifteen, that was about how old he was?

A Yes.

Q Now, did you and your brothers and sister attend school regularly?

A Repeat that, please.

Q You and your brothers and sisters all went to school?

A Oh, yes.

[1082] Q In the normal course, first grade and on?

A Yes.

Q Now, when Johnny was a little kid, did he learn to read and write?

A No.

Q And, when he got back from Mexia, could he read and write?

A He could spell his name, and I think he could spell cat, and maybe dog.

Q Did you work with him to try to get him to read and write?

A Yes, we all did.

Q Who was that?

A That was my dad, my aunt and us other kids.

Q Do you now know that he can read and write at a relatively low level?

A Yes, from what you told me, yes.

Q Do you think Johnny is retarded?

A Yes.

Q What makes you think that?

A It is hard for him to comprehend things. They don't come easy with him. You have to sit there and talk to him for a while before they actually begin to sink in.

Q Did Johnny spend lots of periods of time locked in [1083] a room?

A Yes.

Q And, where were you living when that happened?

A We were living on Brew Street in Baycliff.

Q That was before he went to Mexia?

A Yes.

Q How long was he locked in this room?

A From eight hours on up.

Q And, who would lock him in there?

A My mother.

Q And, did you ever let him out?

A During the day while she was at work, yes.

Q I couldn't understand.

A During the day while she was at work, when she went to work, we did let him out.

Q Were you afraid, back then what would happen to you and/or Johnny if she found out that you had let him out?

A Several times she come home early and we got in trouble, Johnny got beat.

Q Would the family have supper together?

A When Daddy was home, we all ate together.

Q Did Johnny participate?

A We all ate together when Daddy was home.

Q How often was Daddy home?

[1084] A Maybe twice a week at supper time. Lots of times he was late coming home.

Q Did he work long hours?

A Yes, he did. He was holding down many jobs, once.

Q And, when he was not there, what would Johnny do about supper?

A He would do without if he wasn't good.

Q How long would he go without supper?

A About five days out of the week.

Q Is there a bathroom in that room?

A No, there wasn't.

Q Could he get to a bathroom?

A No.

Q What would he do about going to the bathroom?

A He would go to the attic and take a poop.

Q But, he could get to the attic from his room?

A Yes, the attic entrance.

Q Did the room smell?

A Yes, it did.

Q From what?

A From urine and bowels.

Q Is your father still alive?

A Yes.

Q What is the state of his health?

A Well, he has had another stroke, and they found [1085] some kind of tumor or something on his brain. They don't know if it is malignant or not, still running test.

Q Is your mother still alive?

A No.

Q Now, when you had let Johnny out of the room, what sort of things would he enjoy doing?

A We would sit out underneath the fig trees and play cards with him and try to have fun with him, you know.

Q Was your mother affectionate with Johnny?

A No.

Q Ever see her hug him?

A Twice.

Q And, that's it, twice in over the years that you were growing up?

A Yes, ma'am.

Q Did your mother call Johnny names?

A Yes.

Q What words would she use?

A Well, the main thing, was "Blackie Carbon."

Q Why did she use that word?

A She got it off of a commercial, but, she would get hateful like, she was ashamed of him, like she didn't love him or something, you know.

[1086] Q She called him other names?

A Yes, she called him short little bastard, and mother-fucker and all kinds of filthy words.

Q What would the tone of her voice be?

A Hateful.

Q Did you see your mother beat Johnny?

A Yes, I did.

Q How much would she beat him?

A After a while, it was practically an everyday affair.

Q And, was it normal discipline or just a beating?

A It was a beating. Belt buckles, belts, it didn't matter, brooms, toy brooms, sticks and mop sticks, and anything she could lay her hands on, or her feet, stomp on him and stuff, and didn't matter to her.

Q Did she ever threaten to blind him?

A Yes.

Q What would she do?

A He would look at her wrong or something and she would just threaten to scratch his little eyeballs out.

Q Would she do it?

A No, we would stop her. She would put her nails on his face and stuff, and we would stop her.

[1087] Q Did your mother use punishment on him while kneeling?

A That was about an everyday affair, too.

Q How long was Johnny forced to kneel?

A Sometimes, two hours, four hours, five hours. Always happened while Daddy was at work.

Q What would trigger your mother's beatings of Johnny?

A Pardon me?

Q What would trigger them, the beatings?

A Anything. She could be drinking, could look at her wrong and didn't matter, he would say I love you, Mommy, Anything.

Q You mentioned a time that your mother picked him up?

A Yes.

Q Beat him with a mop that your aunt had given him. Can you describe the mop?

A It was a little mop and broom that my Aunt Jane got him.

Q How big was it?

A It was kiddie size, little biddie short thing.

Q Can you tell me how many feet it was?

A Probably about two and a half, maybe three.

Q What was it made of?

[1988] A It was wood.

Q And, what did you see your mother do with the mop and broom?

A Beating him with it and breaking it over his head and his back and his legs and anywhere it would hit.

Q What did Johnny say?

A Please stop, Mommy, please, I love you, Mommy. Don't hurt me no more.

Q Do you remember another time when your mother ran hot water on Johnny?

A Yes.

Q Where were you?

A I was sitting on the toilet taking a "pp" and Mama went into Johnny's room and Johnny had wet the bed again and Mama started running hot bath water, and you could see the steam rising up out of the shower. She drug him by the nape of his neck, like a little dog, by the shirt, back of his shirt, and she threw him in the bathtub and she held his head down with his face in the drain, saying, I ought to just drowned you, you little bastard?

Q She said, drowned you, little bastard?

A Just drown you, little bastard.

[1089] Q What did Johnny do?

A He started fighting and that is when she wanted to – his eyeballs out, pulled him out of the tub.

Q Do you remember another occasion when the mother forced Johnny to drink his own urine?

A Yes, or he had to go and "pp" and he was banging on the door, wanting to go to the bathroom.

Q And, how old was Johnny at the time?

A I'm not sure. I think he was about five or six.

Q Five or six?

A But, it woke Mama up, him banging on the door, and Mama come in there, and he said, Mama I have got to "pp" and I am thirsty. So, she made him "pp" in the toilet and she made me go in there and watch.

Q Why did she want you in there to watch?

A I don't. I guess she got a kick out of it or something, I don't know. She always did that.

Q After he went to the bathroom, what did she do?

A She told Trudy to go get her a cup, and she went and got it. I can't remember exactly how she came in, came in with the cup, but, she dipped [1090] it in the commode and made him drink it and she said that's all your getting for today, so, you better make it last.

Q How full did she fill the cup?

A She filled it up to the rim.

Q Did Johnny drink it?

A I saw him drink it and I had to go outside of the door.

Q Do you remember on another occasion your mother making your brother eat his own bowel movement?

A Yes, I do.

Q How old was he?

A He was about four or five, then, and I had just had a nightmare and I wanted to crawl in bed with Mama, and Johnny was in the doorway, she was facing Johnny, with our heads up against the wall and she was facing Johnny in the doorway.

Q And, what was Johnny doing?

A He was kneeling on his knees.

Q And, what did she make him do?

A I walked by and I smelled a bad smell and I looked at Johnny and he was sitting there, he was on his

knees eating his own bowel movement out of his own drawers.

[1091] Q I'm sorry, I didn't hear you.

A He was on his knees, eating his own bowel movement out of his own drawers, his panties.

Q Was he wearing the panties he was eating something out of, or was he wearing a separate pair?

A No, he was wearing a separate pair.

Q What, did he hold the panties?

A He held them in his hand, cupped them in his hands.

Q What was his reaction to that?

A He was holding it and he was looking everywhere but, Mama's direction, he looked like he was really ashamed.

Q What did she do at this time?

A She was sitting there on the bed drinking a Dr. Pepper and watching him.

BY MRS. LIEB:

Pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Are you married, Mrs. Anderson?

A Yes.

Q Do you have children?

A No.

Q Do you recall – well, you testified that your [1092] brother went to the first grade, is that right?

A Yes.

Q Do you recall that he actually went through the entire first grade year and failed?

A No, I don't recall.

Q You don't recall that?

A No.

Q Do you recall, or do you know that in the second, – the second time that he started through the first grade, that the school officials recommended that he be put into a special education class because he was a behavioral problem in school? Do you know anything about that?

A I was down there –

BY MR. SMITH:

Can we approach, Your Honor?

BY THE COURT:

Yes, Sir.

BY MR. PRICE:

Why can't they state their objection, if they have got an objection, from here?

BY THE COURT:

You all can approach the bench.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH)

[1093] BY MR. SMITH:

The Motion in Lemine, Your Honor, he is required to approach before he goes into prior bad acts, and what he is going to do, is to take a lot of hearsay that comes in from Johnny's mother and ask her if she knows, that is just to get it before the jury, and no way is that appropriate.

BY MR. PRICE:

Behavioral problems in the first grade?

BY THE COURT:

Okay. So far, what he has asked I am going to overrule. If you have another objection.

BY MR. SMITH:

Yes, I do.

BY THE COURT:

That objection is overruled.

(END OF CONVERSATION HELD AT THE BENCH.)

Q Do you know whether or not that the reason that he failed the first grade was because of behavioral problems?

A I'm not sure?

Q Ma'am?

[1094] A I'm not sure on that.

Q Okay. Whatever the record shows on that, I guess that would be the way that it would be?

A I know my mom pulled him out.

Q Okay. You think he was put in a special education school down in Dickerson there, put in special education classes?

A I'm not sure on that. All I remember is that the first grade and Mexia.

Q Well, that is a pretty good jump from the first grade, six years old, and how old was he when he went to Mexia?

A He was about twelve, about.

Q Talking about five or six years, you don't know what happened to him in five or six years there?

A He was at home a lot of times.

Q He never did go to school?

A I would think?

Q You don't recall him going to any kind of special education school in Dickerson?

A No, I don't.

Q Okay. You didn't know anything about his problem at school, behavioral problems, as opposed to mental retardation problems, did you know that?

A No.

[1095] Q Okay. Do you recall much about when he was in the first grade?

A Very vaguely. I remember Mama took him out because she was mad at him for some reason.

Q Would it surprise you to know that he went the entire year to the first grade, and started the second time around in the first grade, and then, was put in a special education school? Is that the way the memory is?

A No, my memory is just the first grade. I remember Mama pulled him out.

Q Okay. The records indicate the school recommended that he be pulled out because he was such a behavioral problem, he couldn't be controlled at school. Would you disagree with that any?

A I don't know. I was young.

Q That could have happened, then?

A Yeah.

Q Okay.

A Possible.

Q He was put in Mexia and stayed up there about three years didn't he?

A I'm not sure how long he stayed up there. I know it was a while.

Q I think you testified a while ago, that he was [1096] how old when he went in Mexia?

A About twelve.

Q He was about how old when he came out?

A Maybe fifteen, I'm not sure.

Q About three years?

A Two or three, I don't know.

Q Your father took him out of Mexia, though, didn't he?

A Yes.

Q They didn't discharge him?

A I'm not sure. Daddy did all of the paperwork, we were kids.

Q You were what, how much younger are you than him?

A Two years.

Q He was fifteen when he came out of there, then, you would be thirteen. You can't remember that?

A No, there is a lot of things I don't remember about my life.

Q But, you can remember all of that abuse that happened when you were two and three years old?

A I had to watch it?

Q I see. But, you don't know anything about when he came out of Mexia?

A I remember we went up there to pick him up, that's [1097] all I know.

Q For Christmas in 1971, and brought him home. Does that sound about right to you?

A I'm not sure on dates.

Q Okay. You remember your father did bring him home?

A Yes.

Q And, he didn't take him back?

A No, he didn't take him back.

Q Do you know why he didn't take him back?

A Well, I thought Johnny was released, I thought that they had called.

Q You didn't know it was because of his homosexual activities?

BY MR. SMITH:

Objection, Your Honor.

BY THE COURT:

Overrule the objection.

BY MR. SMITH:

Move to strike the testimony.

BY THE COURT:

Motion to Strike is denied.

Q Your father never indicated that to you?

A I was young back then, I don't –

Q Thirteen years old?

[1098] A Daddy never discussed things like that with the kids, alot.

Q Okay.

A If that is what –

Q Lets talk about some of this abuse, this horrible abuse.

A He wanted – mainly he wanted to make up for Johnny, what Johnny lost.

Q Lets talk about back earlier when all of this horrible abuse that you so vividly described to the jury, you remember telling your father about all of that when would come in?

A The other kids were scared.

Q You never told your father at all about any of that?

A No, I didn't.

Q He doesn't know anything about it to this day does he?

A He does know, after Mama died.

Q Talking about your father a while ago, he is not an invalid or anything is he?

A No, he's not.

Q He is working, isn't he?

A Yes, he is.

Q Where does he work?

[1099] A He works at Walmart.

Q He lives with you, doesn't he?

A Right.

Q What would you say about the proposition that he doesn't know or doesn't agree with you as to all of this abuse? Have you got an explanation for that?

A All I know is Daddy had a stroke, two strokes, since all of this has happened, and now, he has go the brain tumor in his head, if that is what it is. They are still running test.

Q So, that has caused him to forget about all of this?

A Daddy is going blind in one eye, and he lost half of his memory.

Q I see, the half he lost, I guess, must have been about all of the abuse?

A Daddy didn't know nothing about the abuse until after mom and dad divorced, and us kids got up enough nerve to tell him.

Q How many years did all of this abuse go on?

A Eighteen years because that is how long they were married.

Q I'm talking about your mother, all of this abuse that you just said, told this jury your [1100] deceased mother perpetrated on this Defendant over here. How many years did that go on?

A Until he was in Mexia State.

Q And, you said that was about twelve years old?

A About.

Q And, your father never knew about it?

A Never knew.

Q How often have you visited Johnny in the last ten years, since he has been in prison?

A Well I have been out of state in California and Arizona, so, it has been hard.

Q How many times have you visited him?

A None.

Q Ma'am?

A None.

Q When did your mother die?

A I think she died back in '80.

Q She has testified for Johnny before, hasn't she?

A Yeah.

Q You haven't, though, have you?

A No.

Q Trudy testified for Johnny before, hasn't she?

A Yes.

Q Would it surprise you that she does not, apparently, did not know anything about all of this [1101] abuse that you just described to the jury?

A Trudy?

Q Right.

A Wrong.

Q She does know about it?

A She does.

Q Okay. But, if she didn't testify about it before, that would be one of those things? Is it your testimony that your mother would lock Johnny in the room during the day while your father was working?

A Yes.

Q And, when your father would come in at night, what would happen?

A If Johnny didn't have trouble, we would all eat together. Johnny would eat if it was early enough, if supper had already been served or something, Mama would say Johnny has already eaten, make him go without eating.

Q Your father ever talk to Johnny?

A Yes.

Q Johnny didn't tell him about any problems?

A Johnny didn't comprehend much, and Daddy was away alot and he was holding two or three jobs down, plus Mama's foot operation, he was also [1102] looking after her.

Q When was that?

A It was when we were living in Baycliff. I'm not quite sure of the date or time, and all of the abuse was going on, too.

Q Then abuse that you described to this jury at some length there awhile ago, was rather extensive horrible and lasted, based on your testimony, as I understand it, for a period of about twelve years, is that correct?

A Can you repeat that?

Q The abuse that you so vividly described to the jury a few minutes ago, –

A Yes.

Q – was rather horrible, it was a constant thing that occurred on a regular basis, and lasted for about twelve years, is that correct?

A It is about – alot constant, about, probably five days out of the week.

Q Okay. And, she would keep him locked in the room all day long, is that correct?

A When us kids were at school, I would imagine that is where Johnny was kept while she was at work.

Q Your testimony about he would be required to use the bathroom in his own room, there, she would [1103] make him do that?

A No, he wasn't made to do that, just, he would beat on the door, nobody was home, evidently, he would beat on his door, and beat on the door saying I got to go, I got to go, and then, he was forced to use it in his room.

Q Did your mother work during this period of time?

A Yes, she worked, like I said, she managed at times, she managed at one time a Stop and Go.

Q She worked days or nights?

A Sometimes both.

Q Didn't she work alot of nigh shifts during those years?

A I'm not quite sure.

Q You didn't remember that?

A No. I know she worked nights and days, she was managing seven Stop and Go's, she had to visit all of them.

Q She worked quite a bit, too?

A Yes.

Q Okay. I take it you were in school several years during the time that this abuse was going on, were you not?

A Yes.

Q Did you ever report it to anybody at school?

[1104] A We were afraid back then. Back then, child abuse didn't seem like it was legal, because everybody was getting it. It is more open and out in the area now.

Q So, I take it, the answer to my question is you did not?

A I did not.

Q Okay. You didn't tell your father about it, either, your own father about it either?

A We were afraid?

Q Afraid of who?

A Mom.

Q Okay. Afraid to tell your father because you were afraid of your mother?

A Right.

Q Okay. Where were you convicted of burglary?

A In Granberry, Texas.

Q Burglary of a habitation or burglary of a building?

A Habitation.

Q Okay. First degree felony, isn't it?

A Yes.

Q What kind of punishment did you get for that?

A I got five years probation.

Q When was that?

A It was right after mom died, probably about [1105] '81, '82, something like that.

Q You never told any school officials about it, and your never told your father about it. Who did you ever tell about it?

A We all kept it to ourselves.

Q When was the first time that you ever told anybody about it?

A When mom and dad finally got a divorce, we told Daddy.

Q Told your Daddy at that time?

A Right.

Q When they got a divorce? When was that?

A After eighteen years, I'm not sure, not quite sure the year was.

Q You don't remember when they got a divorce?

A I'm not sure.

Q How old were you?

A In the seventies, sometime, I was about eleven or twelve.

Q That's when you told him?

A Yes.

Q Did he believe it?

A Yes. He bowed his head in his hands and cried.

Q Did your mother do anything physically to Johnny that caused cuts, scars, bruises, whatever, things [1106] of this nature to him?

A He has got scars on the back of his legs, the back of both legs. Asfaras hurting him, if it was an accident, I don't know, because I wasn't born then.

Q That happened when he was two years old, when he got burned in the hot water?

A She claimed it was an accident.

Q So, did your father claim it was an accident, too, didn't he?

A Yes.

Q He was present when that happened, too, he was home when that happened?

A I don't know. I wasn't born.

Q Okay. Aside, – since your recollection, since you were born, since you remember, you were telling the jury, about all of these bad instances. What I want you to do, is tell me about any instances about where she did anything to him that was physical harm to him, caused bruises, cuts, burns?

A She used to beat him with an extension cord, belt buckles, belts.

Q Did they leave marks on him?

A Broomsticks.

Q That leave marks on him?

[1107] A Yes.

Q Bruises on him?

A Bruises.

Q Cuts?

A I'm not sure if he ever got cut. I think she hit him on top of the head, right on top.

Q Are you telling this jury, this type of activity goes on for ten or twelve years and your father never knew about it?

A My father worked full time.

Q Twenty-four hours a day, seven days a week?

A Not like you and I do now, but, more. He had to walk home, Texas City to Baycliff.

Q He did come home?

A Yes.

Q He did see ya'll occasionally?

A Yes.

Q Weekly I would assume, he would see you two or three days awhile ago, when he would come home for supper two or three times a week?

A In time for supper, I said.

Q And, Johnny would eat with you all, is that correct?

A Johnny would eat with us when Daddy was home for supper.

[1108] Q Your father never knew about these beatings and scars?

A No, Mama kept it from him for so long.

Q Was she abusive to you?

A After I had already grown, I think she gave me a bloody nose and black eye, I can't remember which, but, no, I was her favorite.

Q What about the other children?

A I remember her slapping Trudy around, and she broke Jessie's arm, blamed it on me.

Q Broke his arm on purpose?

A She was beating him because he didn't clean the yard up, and slammed the door on him.

Q Anything else?

A He was locked in Johnny's room with Johnny a lot of times, Jessie.

Q Tell your father about that?

A Yes, after Mom and him got a divorce we did.

Q You never told him about Jessie, never even told him when he broke his arm?

A Mama lied to Daddy and blamed it on me, saying he was playing on the coffee table and I pushed Jessie off.

Q Did you tell it different?

A No, we was afraid of Mama.

[1109] Q Okay. Your mother and daddy were separated at different times as you were growing up, weren't they?

A Yes, but, asfaras remembering any of them, I don't.

Q But, you know what I am talking about, don't you?

A Yes.

Q She would be gone sometimes for several weeks?

A I know she drank alot and I know she went out maybe one night a week and whatever, and got lost for a night or two, but, she would come back home.

Q Sometimes she would be gone for several weeks?

A What I heard.

Q You don't remember any of that?

A I don't remember any of those.

Q All you remember is that she was around all of the time?

- A I know that she was around. All I remember mostly is bad things that she to us kids, Johnny, especially.

Q Got a real good recollection of that?

A I sure do, I mean, it sticks in a kid's mind.

Q Yeah, and your father never knew anything about it?

[1110] A My Daddy didn't know until after they divorced.

BY MR. PRICE:

I have no further questions.

BY MRS. LIEB:

No questions, Your Honor

BY THE COURT:

Okay. You can step-down. Who is your next witness?

BY MR. SMITH:

Trudy Ross.

BY THE COURT:

Trudy Ross, Mr. Martin. If you will raise your right hand and be sworn in.

REPORTER'S NOTE: (WHEREUPON THE WITNESS WAS DULY SWORN IN BY THE CLERK.)

BY THE COURT:

Just have a seat. I would ask you after you sit down move that mic to where you can speak into it, so, everyone can hear you. Alright.

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

[48:1111] TRUDY ROSS

called as a witness by the Defense, having first been duly sworn to tell the truth, testified on her oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. SMITH:

Q Where do you live, Mrs. Ross?

A I live in Coolridge, Arizona.

Q Married?

A Yes.

Q Children?

A I have three boys.

Q What was your name before you were married?

A Penry.

Q. Are you related to Johnny Penry?

A Yes.

Q You are his sister?

A Yes.

Q Older or younger?

A I am older.

Q You are the oldest?

A Yes.

Q How much older than Johnny are you?

A Two years.

Q You grew up with Johnny?

[1112] A. Excuse me?

Q Did you grow up with Johnny?

A Yes, I did.

Q You tell the jury whether or not you think that Johnny is mentally retarded?

A Yes, he is.

BY MR. SMITH:

May I approach, Your Honor?

BY THE COURT:

Yes, Sir.

Q I am going to ask you to look at Defendant's Exhibit Number Ten, already in evidence, that has been identified as a photograph of the back of your brother's legs. Do you see the spots of lighter skin on that?

A Yes.

Q Do you recognize those as scars?

A Yes.

Q Did he have those scars when he was growing up?

A Yes, he did.

Q Do you remember any incident in Johnny's childhood that would account for those scars?

A Yes. Can't remember, but, when I was about four he was two, he was scolded in the sink, and then, there was another time, when he was about three [1113] or four, my mother made him stand on the sink in front of the heater, his legs facing the back of the heater, and I can remember blisters on the back of his legs.

Q Now, when he was scolded in the sink, you said he was two?

A Yes.

Q You were very little, yourself?

A Yes.

Q You have a recollection about it?

A I can remember being frightened and scared and Johnny screaming.

Q Who was scolding him in the sink?

A My mother.

Q Do you remember Johnny going to the hospital after that?

A Yes.

Q You also said that he would kneel in front of the heater. Who made him do that?

A My mother.

Q And, where was she when she was doing this?

A She was in the same room, lying on the bed.

Q And, did he say anything to her?

A He wanted to get up and go you know, away from the heater, and he said that it was hot, she wouldn't [1114] let him.

Q You say, you remember blisters on his legs?

A Yes.

Q In general, Mrs. Ross, how did your mother treat Johnny?

A She was cruel to him.

Q Did she hit him?

A Yes.

Q What did she hit him with?

A She hit him with a belt, usually, the side with the buckle, and switches, anything that she could find, and slapped him, clawed him, hit him, and one time she broke a child's broom on him, she hit him with it.

Q A child's broom? Do you know who gave Johnny that broom?

A Yes, my dad's youngest sister, Jane, brought him a little broom and mop to keep his room clean with and my mother broke the broom on him.

Q Did she beat him often?

A Yes.

Q How often?

A Quite often. It seem like he always had fresh marks on his back.

Q Did she ever use cigarettes or anything like [1115] that on him?

A Yes, she would put them to his skin.

Q Did she beat her other children?

A Yes.

Q Did she beat them the same way she beat Johnny?

A She was cruel, but, not like with Johnny. It was quite different the way she treated Johnny.

Q Did she seem to have some special feeling about Johnny?

A She had a hatred for him.

Q Did she ever punish Johnny by making him eat or drink anything?

A Yes. She had – I had witnessed her making him eat his own increment, and also, drinking his own urine.

Q Can you remember specific times when she had made him drink his own urine?

A I can remember when we were out somewhere in the car and Johnny had used the restroom in a coke bottle, and she came out – he was afraid to go outside of the car and do it, he was really afraid to do anything just, you know, what to do, he was always afraid, and she

came out to the car, and she forced him to drink it, and she was real hateful and mean to him, and she even held the [1116] bottle and forced him to drink it.

Q Was Johnny ever kept locked in his room when he was a child?

A Yes.

Q Locked in there for a long time?

A Yes. At this time, it wasn't intentionally that way, it was suppose to be to protect him at night, but, Daddy didn't know that Mama was locking him in all the time and keeping him in there sometime for days without food or water.

Q Did he come out when your father came home?

A When Daddy would come home and he was in time for supper, my mother let him out before Daddy came in, and it was like he hadn't been in there, but, when Daddy would come home, we would eat together and it would be like, things weren't even happening, but, if Daddy didn't come in on time and mother, was the one that came, you know, he didn't come in before supper, late for supper it was like Johnny was put in his room after supper, and he would ask if he had eaten, and Mama would tell him yes, but, he really hadn't.

Q When he was in that room, what was Johnny suppose to do if he had to go to the bathroom?

A Suppose to tell Mama so, she could let him out, [1117] let him go to the bathroom.

Q Okay. If he didn't tell her, what happened?

A Well, when he had to go, he would beat on the door, Mama would come in there and be real angry at him, she would slam the door and start beating on him wouldn't let him go to the bathroom, and sometimes, she would, and other times, I guess, it all depended on her mood, and then, she would beat him and lock him back in there, and he would go in the room and he would get a whipping, and she seemed to find a reason to go in there and see, find it and would spank him.

Q How did that room smell?

A Atrocious.

Q Do you remember an incident in your childhood, involving a knife?

A Yes.

Q Tell us that story, as you remember it.

A I can remember my mother coming home, she was very enraged, she was home late, late hours of the night, and I can remember – I don't remember if she started at Johnny first, or if I was the first. I just remember her kicking me and ripping my dress off, and my Dad sending me to my room, and my room was just right across from Johnny's [1118] and I remember her in there, and she was saying I was going to cut his privates off, so, you won't do this anymore, and she went and got a knife and was actually going to do it.

Q She was going to cut his privates.

A Yes.

Q Did she use the word privates?

A No, she normally used fulgar language, when it concerned Johnny or when she was enraged.

Q You said, she went and got a knife?

A Yes.

Q Did she take that knife into Johnny's room?

A Yes, and I can't remember – I don't remember how my Dad – I just know that he was there, and I remember a lamp or some object being crashed to the floor, and I remember my Dad holding her and trying to take the knife from her, and my memory, I can remember him slapping her, but, my Dad was never violent with my mother, this is the only time I can ever remember him being violent with her, and he was trying to reason with her, and I can remember screaming, Johnny was screaming, please, no, Mama, please, and that's it.

Q Could you describe the knife for us?

A I was about this long, had a black handle, and [1119] it was wide towards the handle and it came to a point at the end of the knife.

Q Did you believe that she was really going to use the knife the way that she said?

A Yes, I was very scared, I was really scared, I was even screaming.

Q What did your mother use to call Johnny?

A Seems like her favorite was Little Bastard.

Q Did she use that name affectionately?

A No.

Q Did she ever show love to Johnny?

A Sometimes after she had been beating him, which was very seldom that she did do this, but, she would hold him to her and say I'm sorry, Mommy loves you and he would say I know that you love me, I love you too, Mama, and then, there was times when around Dad that she would be a little stand offish, but, show more love towards him than normal, and around other people she would be different.

Q When there was visitors at your house, did her treatment of Johnny change?

A Yes, she always made sure that he had a shirt on whenever there were other people there be like nothing was happening.

[1120] Q Was there a reason that she always made sure that he had a shirt on?

A Yes, because the marks on his back all the time.

Q Was Johnny an affectionate child?

A Yes.

Q Was he loving to his brothers and sisters?

A Yes, he would often, even when Mama would be coming, we would try to put him back in the room, and he would thank us for letting him out and he knew all the time that we were going to get a spanking, and he would take the blame and said that he did it, so, we wouldn't get spanked for it.

Q Is it true, Mrs. Ross, that you testified earlier in this case?

A Yes.

Q You didn't tell all of the details that you are telling now, did you?

A No, I was a little reluctant in dealing with a lot of details.

Q Is there a reason for that?

A Yes.

Q What was the reason?

A My mother was there.

BY MR. SMITH:

Pass the witness.

[1121] CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Mrs. Ross, are you still married?

A Yes, I am.

Q Where do you all live?

A Coolridge, Arizona.

Q Where did your mother live?

A My mother?

Q When she died?

A She was living, I believe in Fort Worth.

Q Fort Worth? Moved back to Texas. Wasn't she living in Arizona about ten years ago, herself?

A I really don't know. My mother lived a lot of places. I wasn't around my mother that much after she left.

Q You had testified before on behalf of your brother, have you not?

A Yes.

Q And, as Counsel just pointed out, you didn't testify about all of these details of abuse at that time, did you?

A No.

Q Are you telling this Court and this jury, now, under oath, that the reason for that was because your mother also happened to be in the same town [1122] or in the same Courthouse?

A She was in the same Courthouse, yes.

Q So, what effect did that have on you?

A It scared me, it frightened me.

Q When you were in the Courtroom testifying, she was outside, she couldn't come in just like this trial, other witnesses can't come in, can they?

A Yes.

Q And, that was the way that it was at that time, wasn't it?

A Yes.

Q But, she didn't know what you were testifying to?

A You know, I would not know if someone, somehow would tell her something. I was afraid.

Q Alright. How old were you then?

A I am thirty-six.

Q You were twenty-six then, I guess?

A About that.

Q Okay. Your father knew about all of this abuse I take it, then, didn't he?

A He was working all the time. He really didn't know the extent of it. He was trying to help mother, he knew that mother had mental problems, and, he tried to help her, he tried to help her.

[1123] Q What is the answer, did he know about the abuse, or didn't he know about the abuse?

A I don't think he knew the extent of it. I really don't know. Working all the time, when he came in, everything was normal, when he would come home.

Q You are two years older than this Defendant, are you not?

A Yes, Sir.

Q What period of time, over what period of time, did all of this abuse take place, that you recall?

A The first I recall it was when Johnny was scolded, in the sink, that is from the first that I remember that it started.

Q When his legs got burned in the sink?

A Yes.

Q Your father was home when that occurred, wasn't he?

A I don't remember.

Q Ma'am?

A I don't remember.

Q You do not remember that?

A I just remember being frightened, is all that I remember. I remember what happened. I do not remember who let him in or anything, I just don't remember that part.

[1124] Q You remember when he got burned in the sink, is that right?

A Yes.

Q You don't recall how it happened?

A I was only four, barely four, I just a child myself, I just remember, – Well, it would just kind of kept kind of quiet, but, I know that my mother was bathing him, he was screaming, I can remember that, and I can remember him coming home from the hospital.

Q Can you also remember that what she did was leave out of the room and he got the water turned on, or not?

A I don't remember.

Q And, he was on the other side of the sink, and he actually got into the water and burned himself?

A No, I don't remember that. I just remember that I was frightened and scared.

Q Well, obviously, anytime anybody is injured like that, you were four years old, that would stand to reason you were frightened. You are not setting here and telling the jury, you are not testifying under oath that she intentionally burned his legs like that are you?

A Yes.

[1125] Q You are telling the jury that?

A So many things that she did do to him.

Q How do you know that?

A Because I saw it.

Q Oh. Maybe I just misunderstood your testimony. I thought that you said that you couldn't remember anything but, just –

A I saw him there in the sink, with my brother. I said I didn't remember my father being there.

Q But, you remember your mother? What did she do, hold his legs under the water and burn them, is that what she did?

A She was standing there while he was screaming.

Q Ma'am?

A I remember her standing there while he was screaming.

Q Yes ma'am, but, there is a difference between that and if she testified that she had gone out of the room and

he got in the hot water and she came running back in the room and got him out of the water and then, she carried him to the hospital?

A She didn't run back to rescue him, no.

Q What do you remember?

A I remember her staying there over him while this [1126] was happening.

Q So, you are telling this jury, that she just burned him?

A Yes.

Q Okay. But, you didn't tell that under oath the last time that you testified, did you?

A No.

Q Sure didn't. You said she always made sure that he had a shirt on, is that right?

A Yes, she did.

Q Because he had marks on him?

A Yes.

Q What were these marks from?

A From belts, switches, he had claw marks on him, too. My mother had long nails, and she clawed him.

Q Clawed him?

A Yes.

Q And, she hit him with belts?

A Yes.

Q Did they ever cut him?

A Yes, he had deep marks in his back, deep marks.

Q So, she kept shirts on him all the time?

A Yes.

Q You didn't testify about that, before, either, did [1127] you?

A I don't remember.

Q You haven't read your testimony from before?

A No.

Q You haven't?

A No.

Q Okay.

A I really don't remember what all I said last time.

Q Do you remember testifying before Johnny was mean to his brother, little brother Jesse?

A No, I don't recall.

Q Do you recall that now, that he was mean to Jesse?

A No, Johnny was never intentionally mean.

Q Never was?

A Excuse me?

Q Never was?

A No.

Q I am going to direct your attention back to one time previously that you testified and in response to a question from me, I asked you, "Ms. Penry," and I believe your name was Penry at that time, is that right?

A Yes.

[1128] Q "Isn't it a fact that Johnny Penry was mean towards his younger brother, Jesse, is that correct? "Yes."

A My mother was mean to him, to my younger brother Jesse.

Q The question here was, whether Johnny Penry, this Defendant, was mean to Jesse, and your answer was yes, it was?

A He was never intentionally mean to him.

Q Then, I said, "Did this go on for several years?" And, you answer, "Yes, Sir." "Question, He also had problems with other children in his own peer group or his own age, didn't he? Answer: Yes."

A Well, he was mentally retarded and he was abused at home.

Q Yes, ma'am. I am asking you about violence, now.

A I never said he was mean and cruel to other children. He just didn't act normal around them.

Q Are you saying that this testimony didn't occur, that I just read to you?

A No, but, I am telling you what I meant by what I said.

Q I am just going by just what you were asked and what you answered. You were asked, "Was he mean [1129] towards your brother, Jesse? And, your answer was "Yes," and I asked you then, "Did this go on for several years," and your answer was "Yes, Sir."

Also, do you recall testifying about him taking a sharp object and picking the skin off the bottom of his brother's feet? Do you remember that?

A I don't recall testifying to that.

Q You don't? Do you ever recall that you testified that he would get violent at time at home with you all?

A No, I don't.

Q See if this refreshes your recollection. "Question, of course, this information had to be related to the doctor by someone. Would you say that whoever gave that information was in error?" And, we were talking about some information that was given to doctors about child abuse, and you said, "Well, no, because he would get violent sometimes with us at home."

A I don't recall saying that.

Q You don't recall saying that?

A No, Sir.

Q Okay. Do you recall when he got out of prison on that rape charge in 1979?

[1130] A Yes, I recall that.

Q And, you recall that he went to live with his Aunt and Uncle?

A Vaguely. I don't remember everything that happened at that time. I was kept pretty busy myself.

Q Okay. We are not talking about thirty years ago now, we are talking about ten years. Do you remember, that, when he lived with your aunt and uncle for a little while?

A I remember that vaguely.

Q Do you remember that he had to move out from your aunt and uncle's move back in with your father, because they couldn't control him? You remember testifying to that?

A I remember him coming back to live with Dad,

Q Okay. You remember testifying that was because your aunt and uncle couldn't control him?

A They didn't know how to handle Johnny. Not that he was mean or anything, that wasn't the case. They didn't – it was a burden on them.

Q What did your father have to say about that stinking room that he was kept in?

A At what point are you talking about? I don't understand.

Q During the whole time that he was locked in that [1131] room in your home?

A He said, he would tell Johnny to keep his room clean and to tell Mama when he had to go to the bathroom.

Q He never thought that was because he stunk like that, that your mother was abusing the child?

A At the time I was just a child myself. I don't know what Daddy knew at the time that I was a child.

Q Okay. Well –

A All I knew is I was afraid to say anything myself.

Q Could it be, Mrs. Ross, that Johnny was a real bad behavioral problem?

A No.

Q That's not true?

A No.

Q How do you know that?

A Because Johnny was loving and affectionate and he liked to be around people and he liked to be treated just like every other child would.

Q You got a good memory of that, but, you couldn't remember the other side of it?

A Well, mainly because the others were the bad things, were more numerous, and they were wrapped more around my child-life than ten years ago. Alot [1132] of things I try to forget.

Q In other words, you remember more now than you did ten years ago, or you remember less now?

A I remember more ten years ago than I would now. I was afraid to say a lot then.

Q You sure didn't testify this way ten years ago, though, did you?

A I didn't testify against him.

Q You didn't?

A It was clear that my mother did abuse him.

Q You and your mother both testified for him, didn't you?

A I don't know how she testified. I didn't hear her testimony.

Q She didn't know how you testified either, did she?

A Not that I know of.

Q You are telling this Court that you went into that Courtroom and committed perjury, in effect, because you were afraid of your mother?

A No, at that time I told what I felt. I just withheld some things.

Q If you said that he was violent then, then, your memory was better then than it is now, is that what you just got through saying?

[1133] A No.

Q That's not it?

A Not it.

Q How many times have you visited him in prison in the last ten years?

A I have been out of the State of Texas for seven to eight years, and I went to see him a couple of times before I did get married and leave Texas.

Q What, ten years ago?

A Yes.

Q And, since then, how many times have you been to see him?

A I haven't seen him until today.

Q You haven't seen him?

A No. I have talked to him on the phone a couple of times, but, I have not seen him.

Q Was his room fairly bare asfaras furniture and things of that nature?

A Well, at one time, it was a bed and a chester drawers in there and eventually there was just a bed and then, there was, I can just remember the frame of the bed, and then, I can remember just a mattress being in there and then, I can remember a time when there was nothing in there.

[1134] Q Why did they keep stuff out of his bedroom?

A I don't know. It was just – it was like it was Mama didn't want Johnny to have anything.

Q Okay. Let me see if this refreshes your memory ten years ago. You probably had a better memory then than you do now. "Question: Was there any reason that she kept things out of there?"

Talking about the room, and your answer was, "Yes. What was that reason? Answer: So, he wouldn't hurt himself."

A That was the reason that we were given when we were children.

Q Okay. Okay.

A But, older, I can understand that, that wasn't really the reason.

Q Well, you were twenty-six years old when you gave that testimony under oath, were you not?

A Yes.

Q You were older then, weren't you?

A Yes.

Q And, you were under oath to tell the truth, weren't you?

A Also, I was reluctant because of my mother being there. I did tell the truth, but, I didn't tell the surrounding, the reason why.

[1135] Q Well, is it true that the reason that the room was kept bare was so that he wouldn't hurt himself?

A That was what reason that we were given as children.

Q Is that true as a twenty-six year old woman, did you believe that was the truth when you testified under oath to that?

A No, Sir.

Q Okay. So, you then, lie, then, under oath?

A No, I didn't, lie.

Q Okay.

A I just didn't give the surroundings of the statement.

Q Were you living with your father in 1979, when this Defendant came back home, after he had been living with your aunt and uncle and they couldn't control him?

A Yes.

Q Okay. You were living there, and I think, he stayed there about nine days before he was arrested for this murder, is that about right, nine or ten days?

A I don't recall how long it was.

Q How long had he been out of prison on that rape charge before he was arrested on this case?

[1136] A It was a short time. I can't remember how long.

Q A couple of months, something like that?

A Something like that.

Q You are two years older than the Defendant?

A Yes.

Q Did you know that your parents, your mother included, took him to the University of Texas Medical Branch in Galveston for testing when he was about eight or nine years old?

A I remember that they were getting him prepared to go to a state school to get help, but, I don't – I don't remember when he went. I just remember him going there at one point in his life.

Q Lets back up. Do you remember when he went to the first grade?

A I wouldn't remember when he was in the first grade.

Q You would have been, what, the third grade?

A Third, yeah.

Q He failed the first grade the first year, did he not?

A Yes. Actually, he wasn't really in school that much, though.

Q Do you recall that the problem that he was having [1137] at school was behavioral problems?

A Yes.

Q And, then, they suggested that he be put in a special education school, did they not?

A Well, I remember him being put into one, and I don't remember why, or exactly when.

Q Okay. Your mother and father were doing that, were they not?

A Yes.

Q Okay. All of this abuse going on during this time?

A Yes.

Q Okay. When he was going to school and going to the special education school, when, he was in the first grade?

A Yes. A lot of times he wasn't – I remember Mama took him to Dickinson to a special school, I believe, and a lot of times she didn't take him.

Q What about the first grade?

A Alot of times she didn't send him to school, either.

Q If the records indicate it was because he was a behavioral problem, is that consistent with your memory?

[1138] A That is, I remember, yes, it had to do with some behavioral problems, but, nothing to do with mental problems or anything like that, just he was an emotionally disturbed child.

Q Okay. But, he wasn't emotionally disturbed around the house, he was abused at home, but, he was at school, he was emotionally disturbed?

A If you were abused, you would probably be emotionally disturbed, and other people, too.

Q What I am saying, you say at home, that he was a loving, tender child, never did anything of that type?

A As long as my mother when she was gone, we would sneak him out of the room, and yes, he tried, he tried to be – to play with us and stuff, and enjoy himself, but, yes, he still had problems. He would scared wondering if my mother was coming, and he was scared, frightened.

Q But, he wasn't mean?

A No.

Q So, if you testified to that ten years ago, what is your explanation now?

A I don't believe I testified to him being mean, when we were children or anything like that, [1139] or in the sense, that he was intentionally mean.

Q What about his violence towards Jesse and others?

A He wasn't trying to hurt Jesse, he would be – they would both be trying to occupy themselves they had no toys there, they had nothing there.

BY MR. PRICE:

May I approach the witness, Your Honor?

BY THE COURT:

Yes, Sir.

Q I want to show you your testimony, Ms. Penry, just so that you won't think that I am inventing this some way or another.

BY MR. SMITH:

What page?

BY MR. PRICE:

Page 454, cross examination, about the third question, fourth question.

Q I ask you, and you read along with me here, "Ms. Penry, isn't it a fact that Johnny Penry was mean towards his younger brother, Jesse, is that correct?"

And, what was your answer?

[1140] A "Yes."

Q Okay. Is that your answer today?

A Yes.

Q Was he mean towards Jesse?

A He wasn't mean intentionally towards his younger brother. I did not surround that answer with another comment. I didn't specify the happenings of what things went on, what happened, I just merely answered the questions.

Q And, the next question, "Did this, go on for several years?" And your answer was,

A "Yes, Sir."

Q Okay.

A But, I was probably thinking about the whole thing that was going on with my younger brother, not just that, but, the thing with my mother, and everything surrounding it.

Q Then, the next question says, "He also had problems with other children in his own peer groups or his own age, didn't he?" And, what was your answer?

A "Yes," but I didn't say it was because he was mean to them.

Q Well, I think, that was what we were talking about, wasn't it, being mean to Jesse?

[1141] A That was not testified, was he mean to other children.

Q Okay. Okay. I want to direct your attention to Page 456, of the transcript. "Question: There have been some medical records that Johnny's lawyers introduced some medical records here yesterday, and in those records there are some indications that there was a lot of violence conduct that he exhibited particularly towards other children and I am talking about over a period of several years, starting back in the first grade area.

BY MR. SMITH:

May I approach, Your Honor?

BY THE COURT:

Yes, Sir. What do you need?

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

Before the jury, reading a question from a document in evidence from a prior trial, which is not in evidence in that trial, being prejudicial and requests to strike it.

[1142] BY MR. PRICE:

Proper cross examination. She has indicated that he wasn't mean or violent towards anybody, and in her prior testimony, just a one hundred eight degree difference.

BY MR. SMITH:

Those questions, I didn't object to that. That question, just recites that there were records that were in

evidence, the trial record, but, no such records in evidence here, and I am going to oppose any records coming in here.

BY THE COURT:

Let me see the question.

BY MR. PRICE:

And, a couple of answers. This is a competency hearing, and incidently, this is not the capital murder trial.

BY THE COURT:

Objection is overruled.

BY MR. SMITH:

Just for the record, the objection is under the Fifth, Sixth, Eighth and Fourteenth Amendments to the constitution, corresponding with the Texas Constitution [1143] and Texas Code of Criminal Procedure.

BY THE COURT:

Still overruled.

Q I am going to direct your attention back to the question, Line 15, Page 456 of the transcript. "There have been some medical records that Johnny's lawyers have introduced, some medical records here yesterday, and in those records, there are some indications that were a lot of violent conduct that he exhibited, particularly, towards other children, and I am talking about over a period of several years, starting out back in the first grade area." Was your answer. "Yes, Sir"?

A I wasn't answering yes, that he was being mean to the children. I was answering the question that are based on the medical records.

Q Okay. Next question. "But, of course, this information had to be related to the doctors by someone? Would you say that whoever gave that information was in error? Answer: Well, no, because he would get violent sometimes with us at home."

Is that your answer?

A I don't remember.

[1144] Q Don't remember, oh, okay. I didn't misread is, though, did I?

A No.

Q You were still living at home when he went to Mexia State School, were you no?

A Yes.

Q Your parents got him into the Mexia State School, did they not?

A Yes.

Q They took him up there, did they not?

A As I remember it.

Q And, occasionally they would go visit him or get him and bring him home, on a furlough type thing?

A I don't ever remember them bringing him home, Don't remember moments of ever wanting to bring him home, and I remember going to visit him, and taking him

out for maybe a couple of hours, I don't recall bringing him home. We could have but, I don't remember.

Q How many years was he in the Mexia State School?

A I don't remember that either.

Q Was it about three, be a ball-park figure?

A Perhaps, but, I don't remember.

Q You know about what age he was when he went in?

[1145] A I don't remember, except maybe around twelve or something like that. I don't remember.

Q Did you ever go to the Mexia State School?

A Yes.

Q That is a school, too, is it not? It is not a hospital for the mentally ill or something?

A We were just explained that as children that it was just like a little community that he lived in. I really don't know what it was. I just know what Dad would tell us.

Q Did he ever tell you about any problems that he had up there at the school?

A I don't remember.

Q Do you recall testifying before that he told you that he didn't like it because he couldn't get along with the boys, with some of the boys up there?

A I remember him saying that he didn't like being there. I don't remember as to why at this date.

Q You also, recall that he also told you that he didn't like the teachers up there?

A I don't remember.

Q Okay. If you testified to that before, would that be accurate?

[1146] A I don't even remember.

Q Let me show you your testimony from before and see if it refreshes your memory, a little bit.

BY MR. SMITH:

Can we have the page?

BY THE COURT:

What page, Mr. Price?

BY MR. PRICE:

Page 467. Start with Line 18.

Q "Did he ever talk to you about the Mexia State School? Answer: Once in awhile. Question: Did he like it? Answer: No. He talked about a lot of things that happened to him that weren't good and things like that. Question: What were some of the things that he would tell you about that? Answer: Well, he couldn't get along with the boys, there. He didn't like the teachers."

Is that your answers?

A Yes,

Q Is that pretty well the way that you remember it now?

A Yes.

Q Okay. Your father took him out of Mexia State School, did he not?

[1147] A Yes. I don't think my Dad ever really wanted him to be there. It was just to protect him.

Q Do you recall why your father took him out of the Mexia State School?

A Because he learned everything that wasn't proper.

Q Like homosexuality?

A Yes.

Q You think he learned it up there, is that what your father thought?

A That is what I was told. I don't know if that is what Johnny learned. I just know that is what Dad told me at the time when we were children.

Q And, when he took him out of the Mexia State School, your mother wasn't around at the time, was she?

A I can't remember. I remember he being there when he moved to Goodrich, and I remember my mom being there but I don't remember at what point in life.

Q Didn't they get a divorce shortly after that?

A My mother left.

Q And, didn't they –

A Shortly after we moved to Goodrich, my mother left.

[1148] Q And, they got a divorce sometime after that?

A Yes.

Q Did they get into a custody dispute also?

A Yes. It was a fight between the two of them.

Q Okay.

A For a period of time.

Q Do you recall when your brother may have gone to Austin State Hospital, and Rusk State Hospital on a commitment out of Harris County?

A I remember him being there, but, I don't remember why or when, or when he came home. I just remember that part in life.

Q He wasn't at home when he got committed to those – to that hospital, was he?

A I don't remember.

Q Okay. Your memory is bad in that area?

A Well, I just – I remember a lot of the incidents, but, sometimes, I don't remember before or after the incident.

Q You don't remember him getting into any kind of trouble in Houston, Texas?

A I don't remember

Q Don't remember that?

A What happened, no.

Q When he was seventeen years old, how old would [1149] you have been?

A Nineteen.

Q And, you can't remember what happened when you were nineteen?

A No, I can't remember what happened at that time.

Q Okay. But, you can remember what happened when you were four years old, when he got burned?

A Because I was scared.

Q And, all of those others?

A And, I was abused as a child, also, that is why I remember those things so well.

Q What effect has it had on you?

A Well, I, me, being abused, as a child?

Q Yes, ma'am.

A Well, it hasn't had a very good effect. It has made me want to do my children better than my mother did me.

Q Better or the same way?

A No, definitely not the same way.

Q Better?

A Yes, Sir.

Q And, you haven't gone out here and killed anyone, either, have you?

A No.

BY MR. PRICE:

[1150] I pass the witness.

BY THE COURT:

Any other questions of this witness?

BY MR. SMITH:

Yes, Your Honor.

REDIRECT EXAMINATION

QUESTIONS BY MR. SMITH:

Q Mrs. Ross, is it hard for you to talk about all of these things that your mother did as a child?

A Very hard.

Q When Mr. Price read you a question talking about a medical record, you remember that?

A Yes.

Q And, the question said, information had to be related to the doctors by someone. Do you remember that?

A Yes.

Q Do you know who the someone was that gave the information to the doctor?

A No.

Q You don't know whether it was your mother?

A I don't remember. I don't know. I don't remember.

BY MR. SMITH:

Pass the witness.

[1151] BY THE COURT:

Does the State have any other questions of this witness?

BY MR. PRICE:

Just a moment, Your Honor.

No further questions, Your Honor.

BY THE COURT:

Okay. You can step-down, Mrs. Ross. You are not to discuss your testimony with any other witnesses. You are under the rule, you understand?

BY MRS. ROSS:

Yes, Sir.

BY THE COURT:

Not to ask them what they said. At this time, we will recess for about fifteen minutes. You are still not to discuss the case among yourselves or with anyone else.

REPORTER'S NOTE: (WHEREUPON AT 10:30 A.M. A FIFTEEN MINUTE RECESS WAS HELD.)

(JURY IN AT 10:50 A.M.)

BY THE COURT:

Who is your next witness, Mr. Wright?

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

[48:1152] BY MR. WRIGHT:

Jesse Penry.

BY THE COURT:

If you will raise your right hand and be sworn in.

REPORTER'S NOTE: (WHEREUPON THE WITNESS WAS DULY SWORN IN BY THE CLERK.)

BY THE COURT:

Just have a seat. Okay. Mr. Wright, you can proceed.

JESSE PENRY

called as a witness by the Defense, having first been duly sworn to tell the truth, testified on his oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. WRIGHT:

Q Would you state your full name for the record, please, Sir?

A Jesse DeWayne Penry.

Q Where do you live, Sir?

A 464 West Army, in Coolridge, Arizona.

Q How old a man are you?

A I am twenty-eight.

Q How are you employed?

A I am manager to a pizza place in Coolridge.

[1153] Q Are you related to Johnny Paul Penry?

A Yes, I am.

Q And, how are you related to him?

A Brother.

Q Okay. Are you older or younger?

A Younger.

Q About how many years younger are you?

A I don't know exactly.

Q Alright.

A A few years?

A Yeah.

Q Did you grow up with Johnny?

A Yes, I did.

Q Is Johnny mentally retarded?

A Yes, he is.

Q How do you know?

A Just by trying to teach him to read and write. I have always known more on reading and writing than he did.

Q Okay. Was Johnny treated the same by his mother as you and the other siblings?

A We were both treated badly. But, Johnny was the worse.

Q Okay. Is it to believe that Johnny was really your father's child?

A No.

[1154] Q Sir, for the purposes of the printed record, does Johnny look strikingly different from the rest of his siblings?

A Yes, Sir, he does.

Q Over all, Jesse, speaking of Johnny, was he mean and violent?

A No, he was not.

Q Did Johnny have any tendencies to take the blame for things other than his?

A Yes, he did.

Q Jesse, some years back, isn't it a fact that you did get a conviction for burglary?

A Yes, Sir.

Q Is that in Granberry?

A Yes, it was.

Q Here in Texas?

A Yes.

Q Did you get a probation?

A Yes.

Q Did you successfully serve out your probation?

A Yes.

BY MR. WRIGHT:

Pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

[1155] Q Is that burglary of a building or burglary of a habitation?

A Burglary of a habitation.

Q And, how many years probation did you get?

A Five years.

Q When was that?

A About ten or twelve years ago.

Q You live down the probation, okay?

A Yes, Sir.

Q No problems?

A No.

Q Were you with your sister?

A Yes, I was.

Q When that was committed?

A Yes, Sir.

Q Okay. That is the same offense, or both together?

A Yes.

Q You got no other convictions, I take it?

A No.

Q Okay. And, certainly no violent crimes or whatever in your past?

A No.

Q How old were you when this Defendant went to the Mexia State School, if you recall? Or do you remember much about that?

[1156] A I don't know when Johnny left and came back, I know when he was there, but, then, disappeared and I don't – I don't really remember how it came in like that.

Q Do you remember when he came back, after he got out of Mexia State School?

A I remember, yes, in Goodrich.

Q Okay. And, he lived there with you and your father for a while?

A Yes, all of the girls and us two boys lived in Goodrich.

Q And, were you also, living with one of your aunts?

A My aunt was living with us, well, –

Q The other way around?

A What I am saying, staying at one of my aunt's houses.

Q What aunt was that?

A Evelyn.

Q What is her last name?

A Young.

Q Was she the one that was living with you?

A No, she was living beside us. She had her house and, well, this was her house that we were staying in, too.

[1157] Q That was after he got out of Mexia?

A Yes.

Q Okay. And, how long did he live there with you and your father and sisters after he got out of Mexia?

A I don't know. I was being pulled between the two parents, so, –

Q You go to your mother's some?

A Right.

Q They were having a custody dispute between them over the divorce, is that fair to say?

A Yes.

Q Were you around when he went to Austin State Hospital on a commitment out of Harris County?

A I was gone. No, I don't remember that. I mean, I remember it, but, I don't. I wasn't around.

Q Okay. You do know that he did go to the Austin State Hospital?

A Yes.

Q Transferred there to Rusk?

A Yes.

Q Were you gone from home, the entire time he was in those two hospitals?

A Yes.

Q It was about a four or five month period, I [1158] guess, is all that it amounted to, but, you were not home at that time?

A Right.

Q Do you know why he went to the hospital?

A Just bits and pieces. I never did hear the whole story of it.

Q What are the bits and pieces that you remember?

BY MR. SMITH:

Objection, speaking hearsay.

BY MR PRICE:

I didn't understand the objection.

BY MR. SMITH:

Hearsay.

BY THE COURT:

Sustain the objection.

Q Did you know that he had left home before he wound up in the Austin State Hospital?

A No.

Q You didn't know that he had lived in Lufkin, for a while, worked at a restaurant there in Lufkin?

A No, not at the time. I was in Ohio.

Q Okay. Is that where your mother was at that time?

A Yes.

[1159] Q When did your mom pass away?

A Eleven or twelve years ago. I think it was in 1980, December, or right before Christmas.

Q How old were you – well, you are six years younger than, or approximately six years younger than Mr. Penry is?

A I am twenty-eight, Yes, Sir.

Q Somewhere in that area. You don't, I guess you don't remember much about his early childhood then, do you?

A Well, I remember bits and pieces of, you know, the little things, that a kid will remember.

Q How old were you when you have your first recollection?

A I don't know how old I was.

Q Two or three years old?

A I don't know how old I was.

Q Okay. Do you remember him going over to Mexia State School?

A No, I don't. I remember going to visit him.

Q Okay. With your parents?

A Right.

Q That includes your mother?

A Yes.

Q Are you married?

[1160] A Yes, I am.

Q Do you have children?

A I have a step-daughter.

Q Are you employed?

A Yes, Sir, I am.

Q Who are you employed by?

A Ricardo's Pizza.

Q In your recollection, your earliest recollection of this Defendant, do you recall him being violent?

A No, I don't.

Q Do you recall an instance where he took a sharp object and peeled the skin off the bottom of your feet?

A Yes, I do. If he ever went – he did this, but it wasn't as if he ever made me cry or anything. He would always pat me and say he didn't mean to.

Q He did hurt you some?

A I can only remember one or two instances, yes.

Q You were a very young child at that time, weren't you?

A Yes, I was.

Q But, it sticks out in your mind, though?

A Yes.

[1161] BY MR. PRICE:

I have no further questions.

BY THE COURT:

Any other questions?

BY MR. WRIGHT:

Nothing further, Your Honor.

BY THE COURT:

Okay. You can step-down. You are not to discuss your testimony with any other witness.

Who is your next witness?

BY MRS. LIEB:

Lucille Anderson.

BY THE COURT:

Lucille Anderson.

REPORTER'S NOTE: (WHEREUPON THE WITNESS WAS DULY SWORN IN BY THE CLERK.)

BY THE COURT: Just have a seat and if you would, when you sit down would you move that mic around where you can speak into it so everyone on the jury can hear. Alright.

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

[48:1162] LUCILLE ANDERSON

called as a witness by the Defense, having first been duly sworn to tell the truth, testified on her oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MRS. LIEB:

Q Please state your name?

A Lucille Anderson.

Q And, what town do you live?

A Willis, Texas.

Q Are your related to Johnny?

A I am Johnny's aunt.

Q And, that is on his father's side, is that right?

A Yes.

Q Do you remember your brother's first wife, Shirley?

A Yes, I remember Shirley.

Q She is Johnny's mother, is that right?

A Right, uh-huh.

Q How old was she when she married your brother?

A About sixteen.

Q Can you describe her personality at that time?

A Well, at the time, she was very unhappy because her mother had passed away.

[1163] Q When was the first time you saw Johnny?

A The first time I saw Johnny was when he was brought to me from Laughton, Oklahoma, as an infant baby, three weeks old, his mother was in the hospital, had to be put in a mental hospital at the time.

Q And, you saw him when he was three weeks old?

A Yes.

Q And, who brought him to you?

A My brother and some of his friends from Laughton, brought the children to me because the mother had to be put in the hospital.

Q You were living in Texas at the time?

A Yes, in Houston.

Q Did you take care of the child?

A Yes, for eight months.

Q Okay. Can you describe him physically as a child?

A Beautiful. They brought him to me in a bassinet beautiful little baby boy.

Q Did there come a time when your brother and Shirley returned from Oklahoma?

A Yes. After they released her from the hospital, mental hospital in Laughton, they came to home to take the responsibility of their little children.

[1164] Q And, you were taking care of another child, also?

A Trudy and Johnny.

Q And, did they live with you?

A Yes, for about two months, until they could get on their own.

Q When Shirley returned, did she take-over the responsibility for Johnny?

A She tried, but, it was very hard because the children were looking to me, I was like mama, and it was hard for her, but, she tried.

Q Did you see Shirley show Johnny affection?

A At times she was affectionate, not any long period of time, she would kiss them and love them.

Q Did you ever hear Shirley call Johnny any names?

A Yes.

Q What would she call him?

A The Little Nut, the Little Spoil Brat, the Little Bastard.

Q Was there a meaning behind the name, Little Bastard?

A The only meaning that I could put behind that, is that she said, that is my brother, she come home with us, pregnancy, two months preganant [1165] with Little Johnny, and she knew I knew it.

Q You knew that?

A So that would be behind the words, I suppose, that she would use, and there was jealousy because there was affection towards me like mama, and I could see, you know, why she would feel that way, because it was very hard to turn to the real mama.

Q Did you ever see Shirley slap Johnny when he was a little baby?

A Yes. Not just a slap, she would sock him when he would be sitting in the high chair eating, right in the mouth.

Q See that on more than one occasion?

A I just saw it that one time, and I don't know how many more times it could have happened.

Q How old was he when she socked him in the mouth?

A She had been in our place about two months, after they came home from Laughton, and it was sometimes between those two months that they had to stay with us, until they could get on their own.

Q So, you saw Shirley sock him when he was about ten months old?

A Just a little baby in a high chair.

[1166] Q You were eating at the time?

A Yes.

Q What happened to the food in his mouth?

A If you have a mouth full in your mouth, you are going to spit it out if you are slapped in the mouth.

Q You know what triggered the slap?

A She didn't like the way he was chewing it, or eating. I guess it was kind of, you know, little babies, takes time to learn.

Q Did you see a disciplinary slap, or something worse?

A I can only talk about what I saw.

Q Right. But, was that a normal disciplinary type thing?

A Not towards a little baby, no.

Q It was rougher than that?

A Yes.

Q Did you say something to Shirley when you saw that?

A Well, since we already knew, that I knew that Little Johnny – she was pregnant with him when she came home and my brother forgave her and took him in, gave him his name and to be his father, he tried to be a good father, but, [1167] she knew I knew that he was not my brother's son.

Q Okay. Did you say something to her?

A I told her, I said, that he couldn't pay for what she done wrong, that was her doing, not him, and he wasn't to blame.

Q Meaning that Johnny wasn't to blame?

A Little Johnny was not to blame for the way that he was brought into this wicked system.

Q What did Shirley say to you?

A She didn't say anything, she just looked at me.

Q And, you said that the family moved out when Johnny was about ten months old or so?

A Something like that.

Q Sometime thereafter, did you see Johnny with a broken arm?

A Well, sometime within that first year, I saw his arm in a cast. I did not see the accident, I asked about it, the answer that I got, was that –

BY MR. PRICE:

Objection, Your Honor, to hearsay.

BY THE COURT:

Okay. Don't tell us what someone else told you.

[1168] Q But, you didn't see what happened?

A No, I didn't see it.

Q But, you saw his arm?

A I saw his arm in a cast, right.

Q Was there a time later on when Shirley left one or more of her children with you again?

A Well, she left my brother again some time later, this was after they were situated in their own little home, she left again and was gone for quite some time, I do not remember how long, and she took only Trudy with her and not Johnny, and left Johnny and then, later Trudy was dropped off at my house with impetigo and I, as soon as I got her well, over the impetigo, she came back to get Trudy.

Q Did she want to get Johnny also?

A No, she didn't mention Johnny.

Q Was there a time ever that Shirley physically attacked you?

A Yeah, this one time when she came back just to get Trudy, after I had gotten her well over the impetigo, yes, she attacked me and was accusing me of stealing her children's affection. I knew that she was not well, I knew that she was mentally ill, by the way she acted, but, [1169] I did have to ward off some blows.

Q She actually, –

A She actually attacked me.

Q Did the police come?

A My son had called the police because he was afraid for his mother, naturally, yes. The police came and they had her to leave because she was disturbing the peace, and a man was parked down the road a little ways in a truck, waiting for her and she left with him.

Q And, after Johnny was no more than a little baby, you physically lost touch with him, didn't see him too much?

A I would see him occasionally at family reunions.

BY MRS. LIEB:

I pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Mrs. Anderson, I believe back when Johnny was seventeen years old, did he run away from home?

A I heard that he had, but, I don't know that he had.

Q You don't? You do know that he got arrested in Houston, don't you?

BY MR. SMITH:

* * *

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

* * *

[48:1245] speak into it. Slide around, talk into it so everyone can hear you. Alright.

BILLIE JOHNSON

called as a witness by the Defendant, having first been duly sworn to tell the truth, testified on her oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MRS. LIEB:

Q Mrs. Johnson, please, state your name?

A I'm sorry, I'm a little bit hard of hearing.

Q I will try it this way. Please state your name.

A My name is Billie Johnson.

Q Where do you live?

A I live in Baycliff.

Q How long have you lived in your house in Baycliff?

A Almost thirty-five years.

Q You know Johnny Penry?

A I knew him when he was about two years old.

Q And, how did you know him?

A They were my neighbors.

Q And, about what time, or when were they your neighbors?

A I would say it was about thirty-two years ago, something along there.

[1246] Q So, they were your neighbors when you were living in the house that you are living in today?

A Yes.

Q What sort of a home did they live in at that time?

A They lived in a mobile home.

Q And, where was that mobile home located in relation to your house?

A There back yard butted my back yard. It was about maybe a hundred, hundred and twenty-five feet, from my home.

Q Would it be fair to say that you were the neighbor that lived the closest?

A I'm sorry.

Q It is fair to say that you were the neighbor that lived the closest to them?

A Yes.

Q And, how old did you say Johnny was when they lived there?

A He was about two years old, I would say.

Q Did you know the Penrys well?

A No, I didn't know them very well.

Q Why is that?

A Well, I was pretty busy, and they didn't live there but just a matter of months. Shirley [1247] Jean and I would talk, we didn't have a fence, but, you might say it was over the fence talk, and she told me that she had been in a mental institution, she had been expecting a baby at that time.

Q How many children did you have at that time?

A I have seven. I had seven at that time.

Q Can you describe Johnny's physical appearance at that time?

A I'm sorry?

Q Can you describe Johnny's physical appearance when he was about two years old?

A Can I describe who?

Q Johnny's physical appearance.

A Oh, he was a thin, little boy. He was beautiful, long, black eye lashes, and such a sweet little boy.

Q Did anything unusual happen to you after the Penrys moved in?

A Yes.

Q What was that?

A After her baby was born, every afternoon right after lunch, I would feed my children their lunch and give them their bath and put them to bed for a nap, that was my two younger ones, [1248] and then, I would go have coffee, and that was my time of the day that I could do as I pleased, and, then, I would start hearing these screams, terrified screams, horrible screams. It was fear and pain and pleading in them.

Q Where did the screams come from?

A I'm sorry I couldn't hear you.

Q Where did the screams come from?

A They were coming from the mobile home where Johnny and his parents lived.

Q And, do you know who was screaming?

A Yes, it was Johnny screaming.

Q How did you know it was Johnny?

A I could tell it was a little boy. Anybody could tell it was him. It is the only place that the screams could have come from. It was the screams of a child of that age.

Q And, did you hear any words?

A Sometimes I would hear, oh, no, no, no, no. It was just a great crescendo. I can't simulate the scream, it was too horrible, too terrifying.

Q How long did the screams last?

A Hours, and hours and hours.

Q And, did they happen on weekdays, week-ends?

A It didn't happen on week-ends, they didn't happen [1249] when Mr. Penry was there, that I know of, it was only in the afternoon. Seems like it was at the same time every afternoon. It was sort of a ritual.

Q Did you hear the sound of a child being disciplined or something more?

A No, no, they were terrified screams, terrified screams, pleading screams.

Q Did you ever tell anybody about the screams?

A Yes, yes, I did. I told my neighbor across the street, Mrs. Olney, and I begged her to come to my house and listen to them so we could call the child welfare. It was horrible to get the child welfare to do anything in those days, and I figured if it was two people that could tell them about the screams, that they could do something about it.

Q Did Mrs. Olney ever come?

A Yes, finally she did. She finally came over and had coffee with me, and just about that time, the screams started and she said, my God, Billie, what is that, and I said that is what I have been telling you about, she was hurting that baby, just doing something to that child, and the screams went on and on, and Betty said, [1250] lets go over there, Billie, and I said okay. And, I said, I tell you what, she had a new baby, we will tell her that we have come to see the new baby. So, we picked up some cinnamon rolls and went over, and went up to the porch and the screams continued to go on all this time, and Betty wanted me to wait a minute, wanted to listen a little bit. I couldn't stand the screams any longer, we were closer to

it, and the closer you were, the worse it got and I had to knock and I knocked and the screams stopped and everything was quiet. Absolutely quiet, and it stayed that way for a long time, and, then, I knocked again and it stayed quiet for a while longer and then finally she answered the door, and I told her hello, Shirley, we have come to have coffee with you and see the new baby, and we went in, she made coffee, put the cinnamon rolls on the table and we admired the new baby, and then, I said, well, I want to see Little Johnny, too, and she said, no, he is asleep. I said that's alright, just want to look at him. So, I went back in the bedroom, and the baby was laying there, I mean, Little Johnny was the baby, he was just a baby at two, [1251] and he was covered up and was pretending that he was asleep. His eyelids were trembling, and blinking, he was trying so hard to look like he was asleep, but, I just could tell that he wasn't.

Q Let me interrupt for a second. Did you ever see her beat Johnny?

A I beg your pardon?

Q Did you see Shirley beat Johnny at that time?

A Oh, no, no, no.

Q So, you just simply heard the screams?

A I never spoke to her anything about the child, I only heard his screams every afternoon on the weekdays.

Q Did you say anything to Mrs. Penry at that time?

A No, and I was afraid after I had said what I did about pretending, not really asleep, and he is just putting on, and then, I was afraid that she might become angry

with him not putting on a better act or something, and I went on back into the kitchen where the coffee was and I didn't say anymore. The point was that I wanted to, I wanted the screams to stop and if we went over there the screams would stop, she would stop hurting the baby and then, Betty [1252] would be a witness for child welfare.

Q Did you ever call the child welfare people?

A Betty did. I didn't have a telephone.

Q You didn't have a telephone?

A No, I didn't have a telephone. That is one of the reasons that I wanted Betty to come here so she could call.

Q The screams stopped after that time?

A Yes, they did. They did. But, they didn't live there very long after that, they moved.

Q Did you ever see Mrs. Penry after the time that you went to her house?

A Yes.

Q Where?

A But, she wasn't friendly. When I was in my back yard she was in her yard, she would lift her dress on both sides with her hand and dance around the yard singing old lady Johnson, old lady Johnson, and I just ignored her.

BY MRS. LIEB:

Pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Mrs. Johnson, I believe Mr. Quentin Purvis, who is a Polk County District Attorney Investigator,

* * *

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

* * *

[48:1278] CAROLYN WARD

called as a witness by the Defendant, having first been duly sworn to tell the truth, testified on her oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. SMITH:

Q State your full name?

A Carolyn Sue Ward.

Q Are you married, Mrs. Ward?

A Yes.

Q Do you have children?

A Yes.

Q How many?

A Four.

Q Where do you live?

A Dickinson.

Q Dickinson, Texas. Did you at one time, know Johnny Paul Penry?

A Yes.

Q And, his family?

A Yes.

Q How? How old was Johnny when you came to know him?

A About two years old.

Q And, how did you come to know him?

[1279] A I met his mother, and I would go over and visit them all the time.

Q Where were you living then?

A I lived on the corner of Grand and Eleventh Street, in Baycliff.

Q They lived near you?

A Yeah, about a block and a half over, in a trailer house.

Q How long did you remain in the neighborhood of the Penry family?

A Well, about a year. I lived that close, then, I got married and moved on, I guess, about a mile from them.

Q How long is it since you have been in touch with the family?

A I haven't seen – I seen Johnny once when he was fifteen, he was with his Daddy, and before then, I haven't seen him since he was about seven.

Q Have you ever seen – you haven't seen him since he was fifteen?

A No, I haven't.

Q Let me go back to the time that you first saw him, When he was around two years old, did he wear diapers then?

A I believe he would have had, but, he was burnt [1280] real bad and he wasn't wearing no diaper. He was sitting without nothing on the bottom side.

Q Did you see any of the evidence of the burns?

A Yes, I did.

Q If I suggested – you didn't actually see how the burns occurred, did you?

A No. I seen it after he got out of the hospital.

Q Did Shirley Penry tell you how the burns occurred?

A She said that she had him in the kitchen sink giving him a bath, and he supposedly turned the water on, but the burns were down his back side, and it didn't seem logical to me.

Q She told you that she turned on the water?

A She told me that he turned the water on.

Q And, you said that the burns that you saw didn't look like that could have been true?

A No, because they were on his back, not his side or front or whatever.

Q Did you ever see Shirley punish Johnny?

A Yes.

Q What did she do for punishment?

A Whipped him with a belt, slapped him up the side of the head, anything that she could do.

Q Did it seem like normal discipline to you?

A No. Seemed harsh and cruel.

[1281] Q Made him sit on the floor?

A Yes.

Q How long at a time?

A For hours on end. Not no toys to play with, and he couldn't talk, couldn't get up and move around.

Q Did you ever see any affection between Shirley and Johnny Penry? Did she ever show any affection for this child?

A I didn't see none.

Q Now, am I correct, you lost contact with the Penry family long ago?

A Yes.

Q Let me call your attention to the date of April 29, 1986. This is four years ago. Did you on that day, write a letter to a Warden here in Huntsville?

A Yes, Sir.

BY MR. PRICE:

I am going to ask the reporter – Your Honor, we object to this – Counsel obviously knows this is self-serving unless he has got some permissible ground that he can state now, and I object to this.

[1282] BY MR. SMITH:

Well, our planned to ask her to identify it, before I offered it, Your Honor. Just have it marked to make a record.

BY THE COURT:

You can have it marked.

BY MR. SMITH:

I ask the reporter to mark this document.

REPORTER'S NOTE: (WHEREUPON DEFENDANT'S EXHIBIT NUMBER TWELVE WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

BY MR. SMITH:

May I show it to the witness, Your Honor?

BY THE COURT:

Yes, Sir.

Q Is that a copy of the letter that you wrote the Warden?

A Yes, it is in my hand-writing.

BY MR. SMITH:

Your Honor, I offer the document under the Hearsay Exception, which I [1283] relied on, as highly relevant to critical issues at this stage, and has substantial reliability, and I would like to read it to the jury.

BY THE COURT:

Have you seen a copy of it, Mr. Price?

BY MR. PRICE:

Yes, Sir, I have, and I would like for him to state what exception to the Hearsay Rule this particular document comes under.

BY MR. SMITH:

I just stated that grounds, Your Honor, but, I will state it again.

BY THE COURT:

Let me see the exhibit. At this time, it is not admitted. The objection is sustained. Let me look at it.

Proceed with your questioning.

Q Did you view your letter as self-serving, Mrs. Ward, not what you said, but, do you think it is a self-serving letter?

BY MR. WEEKS:

Object to this question, highly [1284] improper, and not proper grounds for questioning.

BY THE COURT:

Restate your question, Counsel.

Q Do you have any children in the world, Mrs. Ward, to lie and say that Shirley Penry abused her child?

A I had no reason to lie.

BY MR. SMITH:

Pass the witness, subject to redirect.

CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q You were around him from about – how old was he when you were first around him?

A About two years old.

Q It was about '79 the last time that you were around him?

A Yeah, any length of time. I use to baby sit him, him and his two sisters.

Q From two to seven?

A Off and on, yeah.

Q Did you, during that time period, when he was two, three, four years old, did you feel like that he was mentally retarded?

[1285] A He talked good and he listened. I don't know if he could comprehend too good, because you would have to tell him several times, but, I think he was.

Q You think he was mentally retarded, even when he was two or three years old, when you were first around him?

A I think it got worse as he got older.

Q But, you think he was even at two, or do you know?

A I'm not no professional about that.

Q When you first came into contact with him, he had already been burned?

A Yes.

Q And, that is what you testified to?

A He was sitting in his baby bed with no diaper on, just a little shirt, and he was burnt all the way down his little back.

Q On his back?

A On the back side, buttocks.

Q Buttocks, or his back or both?

A From like about here down.

Q From about the shoulder blade down?

A A little below his shoulder blade.

Q You are talking about his back, right?

[1286] A Back side now, right.

Q His back or not?

A Yeah, his back.

Q His back?

A Uh-huh.

Q And, his buttocks?

A Yes.

Q And, then the back of his legs also?

A Yes.

Q You weren't around when that happened?

A No, Sir, I met him after it had happened, and he had done been in the hospital and came out.

Q You indicated on direct examination that she was making him sit in the floor for hours and hours?

A Yes, Sir, sit in the corner, sit in the room by himself.

Q Were you there?

A Yeah.

Q You were there in the house for hours and hours watching her make him do things?

A I would come to visit and see the kids, and see her. She was a nice person at times, and she would make him sit in the floor beside her or you know, because she said he would get into things [1287] and he did get into things, as most kids do, but I didn't see no reason for harsh punishment, you know, just make him sit there for hours on end.

Q And, you sit there for hours and watched him sit there for hours, I take it, is that what you are saying?

A Not really. We would move around, talk and things like that.

Q But, he had to sit?

A He had to sit still, yeah, he couldn't do anything.

Q How long did this go on?

A You mean –

Q How many – did this go on for a period of years, months or what?

A I seen him do it lots of times. Several years, I guess, you would say.

Q What did Mr. Penry say about this?

A He wasn't around at the time that it was going on.

Q Where was he?

A Working. When I first met him he was working for Texaco, and we went to work for, what it was, well, cookbook bread.

Q Did you ever talk to him about it?

[1288] A No. I figured he knew if anybody knew because he was the Daddy in the home.

Q You would think he would know what was going on?

A You would think he would know, yes, he lived with them.

Q I take it that you weren't concerned enough about this conduct to –

A I was fourteen years old when I met him. I didn't know a whole lot about that.

Q That didn't strike you as anything out of the ordinary?

A Yes, it struck me as I wouldn't treat my own dog like that.

Q But, you never said anything to him or anybody else about it?

A What could I say? I mean, a kid talking to an adult, I wasn't – I just wasn't raised to contradict somebody punishing a child, because I was just considered another child in their eyes.

Q Did you ever know her to go off and leave her kids alone?

A I never knew. I never seen them alone, she would come and bring them.

[1289] Q That's all I am asking you ma'am. I don't want – Defense Counsel over here can ask you about repeating about what everybody else told you I just want to know about what you know. Okay?

A I wasn't going to say.

Q Did you ever see her leave those kids alone?

A No.

Q You indicated that she would make him sit for hours at a time?

A Yes.

Q What would you be doing at the house with her for several hours?

A Talking to her, sit around and visit.

Q I take it you liked her well enough to go visit with her?

A I liked her, she was a likeable person at times but, then, when she would get aggrevated, she would take it

out on anything that was available. She never hit me or nothing, or even – I never seen her get mad at me, but, I seen her take it out on her kids.

Q When he was seven years of age, you lost contact what, because did you move or did they move?

A I quit baby-sitting for her.

Q Okay.

[1290] A So, she didn't have no use for me.

Q She didn't have any use for you?

A She didn't have any use for me, couldn't use me.

Q I detect maybe a little hard feelings there about her. What is it?

A It seemed like that is what she wanted me for, you know, if she came around it was to ask me if I would keep the kids, and I was married by then, and I had two babies of my own, and a step-daughter, and I couldn't keep them no more.

Q You just didn't never bother to go back and visit her?

A Oh, I would see her every now and then, and we would talk, but, I never baby-sit no more, so, she didn't come around me that much.

Q When you were over there, you weren't baby-sitting when you were over there?

A No, I just went to visit.

Q For some reason you just decided to quit visiting her?

A Just kind of played out, just like wasn't a whole lot of interest left.

Q Wasn't because you all had any kind of a falling [1291] out or anything?

A No.

Q You consider her a friend when you were going over there and visiting?

A Yes. If I hadn't I wouldn't have went.

Q Okay.

A Except, when I am uncomfortable around somebody, I kind of steer clear of them.

Q You know that she is dead now, don't you?

A Someone told me that.

Q Have you been out there talking with the Penry family today?

A Yes, but, we wasn't discussing Johnny, because they told us not to.

Q You all were just –

A Just talking about old times.

Q Did you know Mr. Penry pretty well back in those days?

A I really didn't know him that good, just say high and stuff like that. He usually went off by himself and done things, you know, unless you asked him, John, how are you, how have you been doing, or whatever, really wasn't very personal.

Q Was he a pretty good fellow?

A Seemed like a real nice person, yeah. He was [1292] hard-working.

Q By talking to the family members, you know that he lives over in Livingston, now?

A Yes.

Q You never did, ever, one time discuss with him any of these problems that you talked about?

A The only time that we discussed anything like that was when Shirley brought the kids to me and would leave them for a week or two on end.

Q My question, ma'am, did you ever talk to him?

A I am fixing to tell you.

Q Just tell me.

A When he came to get the kids, my husband would go get them because he didn't know where they were at, then, we discussed it then.

Q You told Mr. Penry about all of this abuse that was going on?

A Yes.

Q You told him about her sitting him in the floor for hours on end?

A Yes.

Q I thought a minute ago you didn't ever talk to him?

A Well, I didn't talk to him about it when I was [1293] a kid.

Q When did you talk?

A I was an adult by then, I was twenty-one, twenty-two by then.

Q Was Shirley still around?

A No, she had already left.

Q They had separated or something?

A She just left. Well, I guess they were separated, she wasn't there.

Q Who had the kids?

A I had them until he got them and then, I think he took them to one of his sisters to stay.

Q What did he tell you about this abuse?

A I don't think he made much comment on it at all. This has been, what, about twenty-five years ago or better, he come and got them, and I never seen him abuse the kids, he would take them somewhere, where you know, somebody cared for them, fed them and clothed them and stuff.

Q You don't think that he probably knew that this abuse was going on?

A I don't think he knew all of it. He probably knew some about it. I was one of them people that didn't go out and tell family stuff like that.

[1294] Q Were you ever around in the home when him and Shirley both were there with the children?

A Yes.

Q How did she treat the children in front of him?

A She treated them just fine when he was around.

Q You are about the fifth or sixth witness that has come in here and said that out of the family or neighbors, that said, that he didn't know anything about this hardly.

A I figured he knew some of it. He may have not know all of it, but, like I said, he worked, and they were at home by themselves, with their mother.

Q He probably have had to have known some of it?

A I'm sure he knew some of it. He wasn't the type person to go and tell anybody.

Q Nor, evidently, was the type of person that would do anything about it?

A Yes, Sir, seems about like that.

Q Nor, were you the type person that would do anything?

A I guess not.

BY MR. PRICE:

Thank you, pass the witness.

BY THE COURT:

[1295] Mr. Smith, do you have any more questions of this witness?

BY MR. SMITH:

Nothing further, Your Honor.

BY THE COURT:

Okay. You can step-down. Do either of you, object to her being excused?

BY MR. PRICE:

No, Sir.

BY THE COURT:

You object to her being excused?

BY MR. SMITH:

I don't object, Your Honor.

BY THE COURT:

You are not to discuss your testimony with any other witness.

Do you have a short witness?

BY MR. SMITH:

No, I have a -

BY MR. PRICE:

Your Honor, I do have another question.

BY THE COURT:

Mr. Smith, you want the exhibit back?

[1296] BY MR. SMITH:

Yes, Sir.

CONTINUED CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Did you notice anything else about the home out of the ordinary, about the way that they – where Johnny Penry's home was at that time, anything out of the ordinary?

A Where it was located or –

Q No, about the home itself, inside the home, anything out of the ordinary about the inside of that home?

A Looked like a normal house to me, except that they had one old junk room on the back of the house that seemed to me where she shoved Johnny off when he was being punished for something.

Q Were you ever in Johnny's room in that house?

A Yeah.

Q Where did he stay in the house, what bedroom?

A The little brown house that they lived in on Tenth Street, it was the last room in the house.

Q Did he share the bedroom with any of the other children or did he have his own bedroom?

A He did when he was little, you know, a baby.

Q And, who did he share the bedroom with?

[1297] A Trudy.

Q When he was older, he had his own bedroom?

A I think so.

Q Did you ever go into his bedroom?

A It was always a mess all the time, only time I seen it.

Q Why was it a mess?

A It wasn't cleaned. It was messy, like somebody just used it for a junk room and threw all of the stuff in it.

Q Cluttered?

A Cluttered.

Q Did you ever straighten it up?

A No.

Q Did you baby sit him at the house?

A No, when I baby sat him he was at my house.

Q How did he act when he was at your house?

A I didn't have no problem with him.

Q Acted like a normal child?

A He acted like a pretty good kid, he didn't get into things. He played with the other kids and I never seen him abuse any of them.

Q I'm sorry?

A I said, I never seen him hit the other kids or be mean to them or smash their toes or anything [1298] like a lot of little kids do.

Q Was Jesse born before you lost contact with the family?

A No, Jesse was born, I guess a couple of years before we started lossing contact.

Q So, the baby was there?

A Yes, I never baby sat him, but, I knew he was there, yeah.

Q Did this Defendant know how to use the bathroom and everything on his own after he got up to four or five years old?

A Oh, yeah.

Q He could go to the bathroom, use the bathroom just like any normal kid?

A Yes, Sir.

Q When he was six or seven years old, there towards the end of the time that you were around him on a regular basis, did he appear to be a fairly normal child to you?

A Yeah, he didn't – he didn't seem – he done nothing on is own, somebody had to tell him what to do, wasn't doing a lot of thinking on anything and I wasn't around him the little time that he went to school in Baycliff, so, I don't know what was happening.

[1299] Q You weren't around him then?

A No, I knew about him doing it, because his mother told me that he went for a little while, they didn't want him at school, so, she didn't send him no more.

Q Your understanding that they had a problem with him at school?

A That is what I heard.

Q But, when he was around you, you didn't have no problem?

A I didn't have no problem with him.

Q You never knew of him taking a sharp object and picking the skin off of the bottom of his brother's feet, when Jesse was a little small child?

A No, Sir, I didn't know nothing about it. That is the first I heard of it.

Q You never knew of him abusing Jesse?

A No, Sir.

Q Or any other children?

A No, Sir.

Q Did you ever know of him using scissors to try to stick other children with them in school, when he was in the first grade?

A No.

BY MR. PRICE:

[1300] I pass the witness.

BY THE COURT:

You have any other questions?

BY MR. SMITH:

No further questions.

BY THE COURT:

Okay. You can step-down, and you can be excused, but, you are not to discuss your testimony with any other witness.

BY MRS. WARD:

By excused, you mean I can go home?

BY THE COURT:

Yes, ma'am. Alright. Ladies and gentlemen of the jury, we will recess for ten minutes. Start back at ten minutes after three. You are still not to discuss the case among yourselves or with anyone else.

REPORTER'S NOTE: (WHEREUPON A TEN MINUTE RECESS WAS HELD.)

BY MR. SMITH:

My next witness will take the rest of the afternoon, no need to keep Billie Johnson around.

* * *

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(8)

Supreme Court, U.S.
FILED
JAN 11 2001
CLERK

No. 00-6677

In The

Supreme Court of the United States

JOHNNY PAUL PENRY,

Petitioner,

v.

GARY L. JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX
VOLUME II, PAGES 258 TO 530

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CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

[48:1304] DR. RANDALL PRICE

called as a witness by the Defendant, having first been duly sworn to tell the truth, testified on his oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. SMITH:

Q Can you hear me okay, Sir?

A I can.

Q State your name, please?

A I am Dr. Randall Price.

Q Where do you live, Dr. Price?

A In Dallas.

Q Are you married?

A Yes, I am.

Q Do you have any children?

A I do.

Q How many?

A I have one.

Q What is your occupation, Sir?

A I am a clinical psychologist and neuro-psychologist.

Q Tell me your educational background, if you would?

A I have a Bachelor's Degree and Masters' Degree, and Ph.D. in Psychology from the University of North Texas in Denton, with a clinical internship at the Baylor Institute for Rehabilitation, which [1305] is part of the Baylor School of Medicine in Dallas.

Q What do you mean, a clinical internship at Baylor?

A That is a time period after the completion of the normal academic training, where the individual is asked to engage in practice under strict supervision to – the practical skills that they have learned in the classroom during their formal education.

Q And, what area did you work in, in your internship?

A It was the assessment of brain damage and help rehabilitation of those who had brain impairment.

Q Now, you say that you are a psychologist and a neuro-psychologist. Well, maybe let me ask you a different question first. What have you been doing since that intern-ship?

A I have had a practice in psychology and clinical neuro-psychology in Dallas since 1983. I have also taught classes in Dallas at a college known as Rickland College

and I am now of the faculty at Texas Womens' University, which is in Denton.

Q Now, let me ask you what is psychology?

A In its broadest terms, it is the study of human [1306] behavior, both normal and abnormal.

Q What is neuro-psychology?

A Simply as I can put it, it is the study of the brain as it controls the individual behavior. It is a study of brain functioning.

Q Now, as part of your, I think you mentioned that you did some teaching?

A Yes, Sir.

Q Where do you teach?

A I teach on the faculty at Texas Womens' University, and also, at Rickland College.

Q Have you published articles in clinical psychology and neuro-psychology?

A I have.

Q A lot of them?

A Several.

Q Can you mention one or two of the publications?

A Most current was an article in the Journal of Visual Impairment, that was concerning the neuro-psychological assessment of those that are visually impaired. Prior to that, an article that was an examination of the individual's ability to drive an automobile after having brain injury.

Q Are you licensed to practice psychology in the [1307] State of Texas?

A I am.

Q Are you licensed in any other state?

A I am in the State of Hawaii.

Q Is a psychologist different from a psychiatrist, Sir?

A Yes, it is.

Q Explain the difference, briefly, please?

A A psychiatrist goes to medical school. They have training like any other individual that becomes a medical doctor. Upon completion of medical school, they complete a training time period in internship and residency in psychiatry, which involves the medical treatment of abnormal behavior.

A person who is a psychologist goes to college and then to graduate in psychology which is involving anything concerning the study of human behavior. Then, if they chose a specialty in clinical psychology it involves the diagnosis and treatment of abnormal behavior.

Q You have a Ph.D., I believe you said, right, Sir?

A Yes.

Q Okay. Has a psychologist with a Ph.D., has he gone to school just as many years as a psychiatrist?

[1308] A Approximately, Yes.

Q Who spends more time in school studying human behavior, a psychologist or a psychiatrist?

A Studying human behavior, a psychologist spends more time studying human behavior than does a psychiatrist.

Q You are customarily called a doctor, is that right?

A Yes.

Q In your practice of psychology, specifically what type of work do you mostly do?

A The practice that I have primarily done, consists of conducting psychological evaluation, and frequently in my practice, it is involving individuals who have come in contact with, in some way, with the legal system, either criminal or civil.

Q Have you testified in court a number of times, Sir?

A I have.

Q Have you testified both in criminal and civil cases?

A I have.

Q And, in criminal cases, have you testified for both the Defense and the Prosecution?

[1309] A Yes, I have.

Q Is that also true of capital murder cases that you testified for both the Defense and the Prosecution?

A Yes, that is true.

Q Are you an opponent of capital punishment under all circumstances?

A No, I am not.

Q Dr. Price, as a psychologist who has worked in criminal cases, is the issue of faking by a criminal defendant a significant one to you?

A Yes, it is, a very significant issue, and any time a psychological examination is done by a person who has something to gain from looking bad, then, the issue of the possibility of faking becomes very relevant in the evaluation procedure.

Q Have you done any work on how to tell whether a person is faking on a psychological test?

A Yes, I have. That has been some interest of mine, since 1985 or 1986, and I have conducted a seminar in the psychological assessment for faking in several states and Texas, and Florida and California in the State of Pennsylvania, to hundreds of psychologists in trying to atune [1310] them to the fact that it is common for someone to have a tendency to fake, and how it is effected.

Q Have you done any work for – in that area for anybody working at TDC, the Texas Department of Corrections?

A Yes, I have. Last, it was in the month of December of '89, I taught a portion, on this very campus, to all of the psychologists that are employed by the Texas Department of Corrections, in how to assess for faking.

Q Now, you have examined Johnny Paul Penry, haven't you, Sir?

A I have.

Q When did you do that?

A On three occasions, on the 20th of April, 1990; on the 8th of May, and on the 13th of June, all in 1990.

Q And, if you add up the time that you spent with him, on all three occasions, how long did you spend?

A Approximately eleven hours.

Q Now, in your first session on April 20th, what did you do?

A In the first session, I conducted a clinical interview and history, tried to find out some [1311] things about his background, what kind of a person he was, and make some observations of his behavior, especially, and then, planned what type of evaluations I would have to conduct on the subsequent visits.

Q And, then, you visited him again on May 8th?

A On the 8th of May, Yes, Sir, that's correct.

Q What did you do on May 8th?

A On the 8th of May, I conducted the Halstead/Raycon Neuro-Psychological Test Battery, which is a test.

Q What kind of test? What is the purpose for that battery of test?

A The purpose of the battery of test is to determine if there is brain impairment.

Q And, can you just describe that battery of test briefly to the jury?

A Yes. There are ten different tests that attempt to measure and quantify an objective way all the functions

of the brain that are – those that are easily quantified, anyway, that would represent a range of behavior controlled by different areas of the brain, anything from simple things like how fast a person can pass a little apparatus account staff, to how hard they can [1312] squeeze an apparatus with each side of their body, in each hand, to those that are non-verbal kinds of examination procedures. They don't have to have any education for it, it is something that anybody can test them to see, how their brain is functioning, and other test that would test abstract thinking and higher though processes that are somewhat more involved in the frontal area of the brain.

So, the idea of the examination is to assess a wide range of behavior that the brain controls, so that you can see how the person's brain is functioning through their behavior.

Q Is that the Halstead/Raycon Battery of tests?

A Yes, that's correct.

Q And, is that widely accepted in the scientific community as a valid indicator of brain damage?

A Yes, Sir, the most widely accepted battery of tests in the field of neuro-psychology, and it has been used since the 1940's in studies and in clinical examinations.

Q How does scientist know, Sir, if you do poorly on any test, that means, that something is wrong with your brain?

A Well, they – if – it was in the hospital right [1313] after the war, they were able to tests a lot of soldiers coming back from the war, who were known to have a

brain injury. At that time, in the field they were able to keep them alive a lot longer than they had in previous times, when they would send soldiers to war, and also, the kind of ammunition that they would use would – it was not like the kind that they had that explodes and tumbles and things, now, so, it would actually create a smaller hole in the brain, if you will. The person would live, and they would after that would test them with a wide battery of test and see what they couldn't do that people who didn't have that injury could do. They were also able to validate a lot of the testing procedures by having an autopsy after the person had already previously had the test and then, perhaps it was in the condition – it was a medical condition, a tumor, – disease, and they were able to correlate the test finding and the examiner's finding on autopsy of the integrity of their brain.

Q How long did it take you to give the Halstead/Raycon Battery of tests to Mr. Penry?

A Approximately four hours.

[1314] Q How many separate test were there?

A I gave nine of the ten.

Q And, you gave him nine, and there are ten in all?

A Yes, Sir, there is a test that I did not give.

Q Tell me a few examples of the sort of things that you asked him to do?

A Well, like I said, there was a finger tapping test, hand strength, and there is other test where you have him draw things, copy them, see if they can see it, and also, to reproduce it on paper. Some of the problem solving that

they have to do, in essence, learn something right in front of you. It would be a task that they have never seen before so that you can see not what their educational experiences are but, how they would learn something that they couldn't have possibly seen before.

There are other tests that were solving puzzles of different kinds, so, you can see how they solved problems irrespective of their language ability.

Q Do the test reflect any significant degree of reading and writing skills?

A There is part of the battery, the Efasia Screening [1315] Exam that does also test for both the expressive and the receptive aspects of language. The other test is relatively language and education free.

Q The language is important in only one of the nine test that you gave him?

A In the Halstead Battery, Yes, Sir, that's correct.

Q Do you have something that you can use to show the jury, what one of the test that you gave Mr. Penry was?

A I do.

Q If His Honor, will permit I will ask you to step down here and move that table over. I will have to take that table away from you. I'm sorry.

What is that in that box that you are bringing out?

A This is a test that is known as a tapping performance test. This is an excellent test for the test of brain impairment, in that, it is a test that seems relatively

simple in that, that it is a puzzle form, that they have to identify various shapes and put them into the appropriate spaces on the board. Although, it is a little bit different, because we first [1316] blindfold the individual so that this is a type of a task that they have not experienced before, to use the blindfold, and you have the blindfold in place before the exam. You have the blocks in front of them and you ask them to complete this and you show him by the use of your hand the size and shape of the board and you then, ask them first to complete this exam just using their – in his case, the hand that is the dominant hand, he is right handed, so, you first, have them try to complete this with their right hand. If the idea here is that the right side of the body is controlled by the left half of the brain, conta-laterally, is what they call it, you can get an idea, of the functioning of the left hemisphere of the brain. After that, you tandom, you tell them, and explain to them that as fast as they can do it, encourage them as they are in the process of taking the test, and you time them to completion. If, while they are in the process of taking the test, a block falls out that they have put in, in the right spot, if they have already done so, then, after they finish with the right hand and this is what I also ask of Johnny Penry, I then [1317] ask him without taking the blindfold off, to complete the test with their left hand and then after they complete that, also, timed, you then have them use both hands and then, after that third trial, you put the board up, you take the blindfold off, you hand them a slip of paper and you saw draw the board, draw as many of the blocks as you can, try to put them in the right place, if you can. You have a task here also, that would test memory, which is obviously, also a test of the

brain, an accurate examination procedure for the detection of brain impairment.

There are some of the studies that indicate that this is up to ninety, ninety-five percent accurate, and you also, get an idea of a comparison of both the right and the left hemisphere of their brain.

Q I ask you, Dr. Price, how well is a non-brain impaired person expected to do on that test?

A On the first trial that would involve the dominant hand, an individual without brain impairment can complete that in under about seven or eight minutes. Sometimes, lets say, the range is probably about half of that with a person without any type of brain impairment.

[1318] On the second trial, you expect it to be cut in approximately half, or that you would at least expect thirty to forty percent less time on the second trial, and if they have learned something, it should be transferred from one hemisphere to the other, and should be about four minutes at the most on the second trial.

At the third trial involving – so that they could use both their right and the left hand, it should even – they should be able to complete that even quicker. Well, usually, then, it goes down to a couple of minutes to complete that.

Q How long did Johnny Paul Penry take to complete it?

A On the first trial, he took approximately eleven minutes, which is in the brain impaired range as a score. It should be eight or less. On the second trial, that you would expect it to have a completion time that is alot

quicker and his was actually more, the second trial, it took him fourteen and a half minutes to complete.

On the third trial, he was able to then, experience some transfer and come back in again with the right hand again, and took him four minutes. [1319] So, it was a total of twenty-nine and a half, for the total time that it took him to complete the task.

Q What is the most that you say someone that is not brain impaired?

A The total time should be about fourteen minutes. So, it took him about twice as long as a person without brain impairment to complete the task.

Q Did you consider the possibility that he was just faking?

A Sure.

Q Do you have an opinion as to whether he was faking?

A I do.

Q What is that opinion?

A That Mr. Penry, that he was not faking on this particular test. On this particular test, if a person is trying to fake part of it, they will often times, they will just stop and say they can't do it, take off the blindfold, sometimes themselves, and they will certainly have time, in other words, that they just don't do, anything. He continually tried to complete the task. Actually, he became like alot of [1320] people that I have had the chance to examine, I really became sort of caught up in this, and wanted to do

as well as he could. Usually, individuals, whether they are in contact with the legal system or not, on tests like this, they can get caught up in trying to finish it, if for no other, at times, they want to finish it so that they can get it over with, because this is a frustrating task for them. He continually tried, even though his strategy was very ineffective and he would try at times to continue to put a block in a space that didn't fit, he would keep trying the same task. He would approach it in a random fashion, instead of a strategy but, those who fake, usually just slow down and do not do anything. He did not do that on this task.

Q Why don't you put that away and get back to the witness stand?

A Right.

Q Okay. On the whole battery of test, Doctor, do you have an opinion as to whether Johnny Penry was faking?

A I do.

Q What is that opinion?

[1321] A It is my opinion that he was not faking that the examination was a valid one.

Q What is the basis for that opinion?

A Well, there are actually three or four things to look for to assess the possibility that the person is trying to in fact fake, and that in all of those cases, the three areas that I would look for in this type of examination, first, is to look at the record to see if there is some examinations that were conducted at some time that the

person was not in contact with the legal system, so that they didn't have anything to gain from faking. That was the case with Johnny Paul Penry, there were examinations in the record from the age of nine that had suggestions that they thought there was brain damage or brain impairment, or that they come out with a strong opinion and some evidence that would indicate even that at an early age that there was brain impairment.

So, I was – I would first look at the report, the, and the second thing that I would observe, their behavior, that is why I like to do the testing myself, so, I can watch them, and like I described on the performance exam, that [1322] frequently those that are faking, they stop trying, they are uncooperative, and they are fairly obvious in their attempt to not attempt to put forth their best effort. That was not the case with Johnny Paul Penry. He tended to respond to encouragement, actually he didn't like to do poorly on the test that he did poorly on, he wanted feedback, if he did well or not, and that is the observations that I had, was that he was giving forth effort on the test.

It is a third area and I think that it is the most important in examination for faking, is that any time that somebody is going to fake a disorder they fake what they think the disorder ought to be like. Now, frequently the thing is, is if they don't know exactly so they have a perception of what a person, as an example with brain impairment, what they would be like on the test, and that is what they try to fake. Usually in so doing, they have a test performance that is inconsistent, in other words, on some of the test that starts out with easy items and then goes to harder items, some of them go back and forth,

they tend to keep the consistency that an individual with valid brain impairments [1323] has sometimes they get the easy items wrong and they end up with something that is harder, they end up having it as a correct performance. They also sometimes will score high on a certain test and then, as it so happens, we have another test in the battery that measures the same kind of ability, the same brain functioning, and so, then, they will score low on that one because they are inconsistent. That is the important thing to look for in terms of assessing faking.

In the case of Johnny Paul Penry, he didn't do any of those, he was consistent, easy items right, hard items wrong, on test that would measure similar functions, he scored it at about the same level.

Also, there is some research that shows that those that are trying to fake brain impairment, they have certain things that they think that they should fake. Usually, it is a sensory and motor ability. Their hearing, their vision, if they can feel things that you write on the back of their hand, or touch each hand with their eyes closed, or in finger tapping, they will do that slowly, and it is those things, because they thing that a brain [1324] impairment is being that the person at least is clumsy, or slow to move or uncoordinated, eye hand coordination, and those are the tests that they do poorest on, those that are faking tend to do their best on finger tapping, strength of grip, the conceptual examination, and speech sound perception, those the brain impaired that shows the best test, that he does the best on, indicates mild to moderate brain impairment, and only if there is very severe, usually, fairly current brain impairment, they are going to do poorly on those tests, and instead, those that

have had a brain impairment for some time, tend to do the poorest on, a certain set of test, the category test and also tracking performance test, and those are the ones that Johnny Paul Penry did the poorest on.

Q How did he do on the finger tapping, things like that?

A Well, it was a sensory perceptual exam, was the only testing procedure that he scored in the area that would be in the range of normality.

Q What is that? What test is that in hearing and things like that?

A Yeah, on the finger tapping, he scored in the [1325] impaired area, but, just barely. So, those he did fairly – those were his highest scores, and those are what people usually fake. The final procedure, sometimes, we can use some specialized kind of technics in an attempt to give them an opportunity to fake and see if they will do it.

Q Do you have something there you can demonstrate?

A Yes, I do.

BY MR SMITH:

I think, maybe just for the record, I am going to ask the court reporter to mark it for identification if I may.

REPORTER'S NOTE: (WHEREUPON DEFENDANT'S EXHIBIT THIRTEEN WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q Okay. What is Exhibit Thirteen for identification Dr. Price?

A It is a thirteen item test. This is an interesting procedure that you give the person an opportunity to fake. Give instructions, you say, now, the next test is a somewhat complicated test, I am going to show you fifteen different items, and [1326] I am going to show you this for ten seconds, and I want you to, after I have taken it away, I want you to try and remember as many of them as you can, and then, you show them the test for the ten seconds, you count the ten seconds and they at times can study it, sometimes, you hand it to them and you allow them to study this test and you say it is a complicated test, only ten seconds, and after that, you take it away. Well, actually, it is an easy test and that if this person is not severely brain impaired so that they would have some paralyzed or severe speech problem or something that anybody could tell, they would have to be very, very impaired to not get at least nine of the fifteen and if they get nine or less, we really suspect that they are trying to do poorly on purpose, they are trying to fake. So, this is an interesting test.

Q Did you use it on Johnny Paul Penry?

A I did.

Q How many did he get right?

A He had twelve of the fifteen, so, it shows to me, that he was trying and not trying to fake that particular test.

[1327] Q Now, Sir, can you summarize the results of the Halstead/Raycon Test, the whole battery of tests that you give him at this time?

A I can. I gave, out of the ten, I gave nine out of the test in the battery. He scored in the brain impaired area, in all, save one, that was the sensory perceptual examination, all of the other test, the brain function, he scored in the area is associated with those that a brain impairment.

Q As a result of that, do you have an opinion as to whether his brain is or is not impaired?

A I do, yes.

Q What is that opinion?

A That he clearly has a case of brain impairment.

Q Now, apart from your own observations, I think you mentioned a few minutes ago, that you reviewed the records. Have you reviewed any records that relate to your finding of whether Johnny Paul Penry suffers from brain impairment?

A I did.

Q And, let me show you Defendant's Exhibit Six. I am going to put it before you, and I am going to put before you a copy of a document that has been marked and received in evidence as Defendant's [1328] Exhibit Six.

Is that one of the documents that you reviewed?

A Yes, Sir, it is.

Q And, you see the line that begins, "Impression" there?

A I do.

Q First of all, when was that test given? When was that report done on Johnny Penry?

A August 25, 1965.

Q You know how old he was then?

A He would be nine years old, then.

Q And, what was the examination, or the psychologist's impression recorded in that test?

A The impression was that he had diagnostic impression of mental retardation, with a significant degree of organicity.

Q What does the organicity mean to you?

A That is an older term for brain impairment.

Q Let me show you a copy of Defendant's Exhibit Three, which is already in evidence. Is that one of the documents that you reviewed?

A Yes, it is.

Q And, is there anything in there that you regard as indicating brain impairment?

[1329] A Yes, that the examiner on the test that is known as the Bender Gestalt.

Q I'm sorry to interrupt, but, when was that test taken?

A The report was written on January 23, 1973.

Q So, how old was Johnny then?

A He would be seventeen.

Q Okay. I'm sorry. Go ahead.

A There was a part of the examination that was given, and just an educational examination in the school system, in Goose Creek Independent School District. They gave him the test known as the Bender Gestalt, which is a test where you present different kinds of drawings or figures and you ask them to copy it. So, it requires some eye-hand co-ordination, it is not a drawing test, but, the person without brain impairment can make the figures look like the figures on the – . There are some certain things that people who have brain impairment tend to do, and those are noted here, that he did at that time, that they were distorted, that they didn't look like the figures, they were over-lapping, drew them on top of each other, and there were also, [1330] the crowding of trying to draw them too close together. Those are not the kind of things that people without brain impairment typically do on the Bender Gestalt, especially at the age of seventeen.

Q Okay. Now, for quite a while, I am asking to go to the Halstead/Raycon Test, that was the second of the three sessions with Mr. Penry, right?

A That's correct.

Q What did you do the third time? I think you said, was sometime in June, June 13th?

A June 13th. I at that time, administered an IQ test, which is the Wechsler Adult Intelligence Test, and at that

time it was revised, referred to as the Wechsler Intelligence Adult Test, revised, and that is the test that I gave him at that time.

Q And, how did he score?

A Well, it has three IQ scores that are intended to give us an indication about, again, not only their brain, but, also their experiences with education, what they have learned, not how they have learned, but, how they have learned that typically, is shown in the verbal IQ, which [1331] his was 63, was the IQ that I obtained at that time.

There is a performance IQ, that is the type that typically is not so influenced by their educational experiences, and instead more eye-hand coordination, nonverbal kinds of things, and his IQ in that area is 66.

And, the full scale IQ, when combined all of the different sub-test and compare the person of those of the same age group, his was a 63, on the full scale IQ.

Q And, what do those scores indicate to you about Mr. Penry's intelligence?

A That he is mentally retarded.

Q Mentally retarded, something different from brain impaired, Doctor?

A It is a symptom of brain impairment. That there is a lot of possibilities for causes of mental retardation and that in those causes, the predominant one is in fact, is brain impairment, and so, that it is a symptom of the underlying brain impairment.

Q So, you are saying that, putting it this way, are there some people that are mentally retarded, for some other reason other than brain damage?

[1332] A That is what we think. Sometimes people say that we just don't know how to assess it, or some other problem is there, but, there is a significant portion of those with IQ's below 70, that there is no known biological cause of their IQ or their mental retardation.

Q Are there also many people with brain impairment that caused the mental retardation?

A That's correct.

Q Is Johnny Penry one of those that the mental retardation is caused by brain impairment?

A I think it is a substantial part of the cause I think it is hard to separate the cultural education aspect, but, certainly in this case, the underlying brain impairment is a big part of his mental retardation.

Q Dr. Price, have you reviewed the scores of Johnny Penry's previous IQ tests taken throughout his life?

A I have.

Q Are they consistent or inconsistent with the results that you got on your IQ tests?

A They are largely consistent. I find that there is nothing in the files that I have seen with regard to previous examinations on IQ scores [1333] that is consistent with the present finding.

Q Can you explain why you find that in July, '66?

A Well, there are certainly scores in the record that are not the same as the score that I obtained, and lots of reasons why IQ scores for an individual who has several times of taking the test, lots of reasons why they can be somewhat different.

A part of it is that it is strictly because of the fact that the tests aren't perfect, there is a measurement area that we talk about as being that there is a plus or minus five or six points that you have to add to and subtract from any finding, because of just the error involved in the test.

Also, sometimes there is an error on the part of the examiner, especially, and this happened on at least two of the examinations that I saw in the record or Johnny Paul Penry and that is that they didn't give the whole test there were two of the times that the score was most – from the scores that I obtained, and close examination of the file indicated that they didn't give all of the test. It was like that they asked him to run a mile and they stop him half way through and multiplied times two. They [1334] simply didn't give the whole test, and they estimate the parts that they didn't give.

Also, like anybody to take these tests, we all have our good days and bad days, in terms of thinking, memory, concentration problem-solving. The problem here is that at the lower level of intelligence, and on the IQ test there is not as many items as there are hard items, so, a person with a low intelligence has a bad day and does poorly it affects their scores more, because not as many items attempting to measure that particular function. There are times when, if they take a lot of IQ tests in a short period, especially the same one or similar, the two or three that

we use, there is a practice effect like a puzzle that you put together, after you figure that it is an elephant, after you see that again, it is easier to complete the puzzle. So, you have the practice effect.

Also, the person can improve, they can have experiences, especially with verbal abilities, that they can get better, they can learn they can acquire information, increase their vocabulary and score higher on some of the tests, [1335] because they done better. So, I don't see anything in any of the records that I have reviewed that I can't explain the differences on the combination of those ideal factors that can influence a person's IQ scores.

Q Would it be correct to say, Doctor, that as a guide, every score above 70 in a competent IQ test, is a sign that he is not mentally retarded?

A No, that would be totally incorrect.

Q Is that a totally unscientific opinion in your view?

A Yes. Even if you take the idea of the fact that there is error involved in them, and adding two to five points are subtracting it, that is often times going to create a – interval and instead of actually sitting and paying particular attention to one score, usually the trained clinical psychologist will talk about a range of scores that he can be confident that this person's intellectual functioning falls within.

Q Now, Dr. Price, you said, that the mental retardation appeared to be caused in substantial part by brain impairment. Are you able to say [1336] what causes the kind of brain damage you found in Mr. Penry?

A I don't know for sure, I don't.

Q Can you tell me some possible causes?

A A lot of things that can cause brain impairment. It is likely that in this case and others, actually if it is mental retardation, that usually happens early in life. It could be in pregnancy it could be that there was a lack of proper diet, poor care, exposure to alcohol, or other substances that can cross the placenta and effect the developing fetus. Could be something happen in the birth process. Only a short time period of lack of supply in terms of blood supply, it would go to the infant's brain that carries oxygen. If there is a time period that that is going to be stopped, that can cause some brain impairment. It also could be an accident or a head trauma that could happen early in childhood, either like a car accident or a serious head trauma.

Q What does head trauma mean?

A It is a head injury, where the person hits their head or something else strikes their head. Could be something that happened that was a single [1337] event, or it could be especially in childhood a series of rather mild bead traumas, that in time, a person especially a child strikes their head, or if they have something hit on their head, and it causes like a mild concussion, that at times, doesn't cause any permanent impairment, but, if the situation happens over and over, especially if there is a child, the brain doesn't have time to recover, and having a series of head traumas can also cause some brain impairment. All of those are possibilities.

Q Dr. Price, is brain impairment, the kind you found in Johnny Paul Penry, known to ever be related to criminal conduct?

A It is.

Q Explain the relationship.

A Well, it is indirect. It doesn't, of course, directly cause criminal behavior, but, brain impairment of this type, causes the person problems in areas such as the individual, if they can control themselves, impulse control, with these things, about tolerance, it decreases that. It effects their judgment and their ability to reason. The ability to make smart decisions for themselves, and others and in [1338] general, the brain impairment can cause a certain degree of instability behavior, and indirectly, those things are some of the very things that are involved in some criminal activities.

Q Are you saying that someone whose brain is impaired, is not to blame if they commit a crime?

A No, I am not saying that at all, but, I am saying that you can't blame Johnny Paul Penry for having brain damage.

BY MR. SMITH:

Pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q You can't blame Johnny Paul Penry for having brain damage is that what you said?

A Yes, Sir.

Q That doesn't mean that we can't blame him for capital murder, though, does it, Doctor?

A No, Sir.

Q Or rape?

A No, it doesn't mean that.

Q What type of records have you reviewed of Mr. Penry?

A The previous psychological and psychiatric evaluation, as well as these two or three that [1339] came from schools that he was enrolled in, in both in public schools and when he was at the Mexia State School.

Q Are you telling this jury that you just reviewed certain, selected items of his records?

A I reviewed those that were pertaining to psychological testing.

Q You didn't review all of these mental health records?

A Well, I reviewed those that were involved in an evaluation, not those that were involved in treatment.

Q Why?

A That was the source of information that would be the most valuable to someone that is conducting a psychological or neuro-psychological evaluation, because there is some objective findings there that I would like to look at, when I do this kind of an examination, so I can get some point of comparison.

Q Okay. Did you review his records from the UTMB in Galveston, University of Texas Medical Branch in Galveston, back in 1965?

A There was a report and a letter from that time period that – at the University of Texas Medical [1340] Branch in Galveston that I saw.

Q A report and a letter?

A Right.

Q That all you saw?

A There was a psychological report that was dated August 25, 1965, and there was a letter to the Austin State School that was done on May 2, 1966. Those were the two things that I reviewed.

Q Two documents from the UTMB. You know what I am talking about, don't you?

A Yes, Sir.

BY MR. PRICE:

Do you mind giving me that exhibit from the Competency Trial, UTMB?

Q Who furnished you those records, those two documents that you talked about out of the University of Texas Medical Branch out of Galveston?

A Those were furnished to me by the attorneys of Johnny Paul Penry.

Q Were you brought into this case by the attorneys for Johnny Paul Penry?

A That's correct.

Q Back in April?

A Well, it was – the first time that I discussed [1341] the case was in April, and then, it was on the 25th of

April, was the first time that I conducted any part of the evaluation procedure.

Q When was the first time that I was actually involved in this case or contacted.

A It was early in April of this year.

Q About when?

A I believe it was about the ninth or tenth of April, something like that. I'm not certain.

Q And, the attorneys furnished you with certain records, I take it?

A Yes, Sir, that's correct.

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBER NINETY-ONE WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q I am going to show you what has been marked as State's Exhibit Number Ninety-One, and were all of those documents there previously been represented, I believe to be his record, from the University of Texas Medical Branch in Galveston. What were you furnished?

A Here is a letter to the Austin State School, was the first letter, other than a letter from the attorney at the time that is dated May 2, 1966. [1342] I was furnished that document. This looks like a questionnaire to the school system

Q Were you furnished that?

A No, I had not seen that or if I did, it is not in my file.

Q Let me direct – what you are talking about, going back to that, please.

A Yes.

Q See if I can – you see this line right here – would you read that?

A Yes. It says, the school has him down as retarded, but, the test show that he was just slow with a question mark after it.

Q "School has him down as retarded, but, the test show that he was just slow?" You weren't shown that document?

A I think it was referred to in another letter from the principal.

Q Okay. Just get your records out, what you were furnished with, and then, we will know.

A 5/04/65. I did not see this. That looks like a referral sheet that was going to UTMB.

Q Why don't you get out what you were furnished?

A I had it right here.

Q Get out the UTMB. Where is it?

[1343] A (Indicating) Here is the psychological August 25, 1965.

Q Were you furnished this document that you just read, that says that the school has him down as retarded?

BY MR. SMITH:

Object to reading the document that is not in evidence, and the witness has never seen.

BY MR. PRICE:

I am just asking. I can ask if he was furnished that document.

BY THE COURT:

Yes, Sir. Overrule the objection.

Q Were you furnished that document?

A I never seen that document.

Q Didn't you just say that it was referred in something? Would you mind showing me what it was referred to?

A I believe it was a letter that came from the principal, but, it was before that, so, that was not referred to, if it was in 1963, it was a letter from a principal that I saw. I don't have a copy of it.

Q Where is that letter that you saw?

[1344] A I was shown this when I was looking at the file, and this was not something that had any scores or anything objective in it, to me, so, –

Q I take it that you were shown more documents than what you have brought in here to Court today, and you picked out the ones that you thought were relevant is that right?

A There were trial transcripts that I did not think, –

Q I'm talking about his medical, mental health records.

A Oh.

Q That is what we were talking about, wasn't it?

A Yes.

Q Were you shown some other documents that you haven't brought here with you today?

A Only the letter from the principal in 1963. The other ones I was shown, I have copies of right here.

Q Is that the only document that you were shown that you didn't bring with you today?

A I didn't copy it, no.

Q Okay. Were you shown any of these records?

A I have no –

[1345] Q This is a document dated May 2, 1966.

A Yes.

Q Okay. You have that and you have the one, well –

A That's the same one.

Q Were you shown any of these? Were you shown this closing summary?

A The progress reports wasn't – I asked for at my request, what I asked for is any of the records that had scores, any of the records that had something objective that I could compare my findings to.

Q Were you furnished records from other facilities also that he was either in or tested by?

A Yes.

Q Over the years? Specifically were you given records from the Goose Creek Independent School District?

A Yes, I was, and a report that was dated 1/23/73.

Q Where are those documents that you were furnished from Goose Creek?

A Right here.

Q Okay.

A There is an educational prescription – education prescription dated 6/10/71. There is an appraisal report that is dated 1/23/73.

[1346] Q Okay. I want to jump back to that, UTMB record just a little bit. You were shown the psychological report dated August 25, 1965, is that right, showed his test, IQ test?

A Yes, I was.

Q That showed a verbal IQ of what?

A The verbal IQ was 72.

Q What does a verbal IQ measure?

A That is part of the intelligence that is involved with language, either the ability to understand it when it is spoken to you, or to give answers that are answers that require the use of language, that require the use of words and answers that primarily have the person's educational experience and background.

Q Did you review that, that August, 1965?

A I have.

Q Were they all there, or was that one of those that they just guessed at?

A It was one that they did not complete the test, they didn't give the vocabulary sub-test, the verbal IQ part of it, and that, although, that test that takes a little time to give, is one of the better ones, in assessing the person's verbal IQ, so, they skipped that one, and then, [1347] they had to estimate it, or to calculate the IQ without that part of the sub-test.

Q So, that test wouldn't particularly be that accurate is that what you are saying?

A I think the fact that they did not follow standard procedures and they left out parts of the test, would tend to decrease its accuracy in my opinion.

Q Were the tests furnished to you, the IQ tests?

A The answer sheet was.

Q Okay. Could I see that, please?

A (Witness handing)

Q Can you tell whether that test was an accurate assessment of his mental capacity at that time?

A That test, or referring –

Q The one given to him.

A The one –

Q 1975, the full scale, the whole –

A I think it is an estimate of his intellectual functioning, at that time.

Q Okay. So, you don't disagree with the results of it?

A I don't disagree. I think we could have gotten a better picture had they given the whole test, [1348] but, it is an estimate of his ability at that time. I would consider it accurate.

Q Were you furnished his records from Austin State Hospital and Rusk State Hospital?

A Austin State Hospital, September 13, 1973, psychological evaluation. Austin State Hospital September 17, 1973, that was the in-take; and at Rusk, a psychological evaluation that was conducted on October 23rd, 1973.

Q But, you weren't furnished all of his records from these two institutions?

A I received the psychological evaluations, which is what I asked for.

Q We managed to lose Austin State records, but, I am going to – what was it that you – get the UTMB records out again.

A There is the letter to the Austin State School from UTMB.

Q Okay.

A Now, did you want the Austin State Hospital?

Q Yes.

A Austin State Hospital, psychological evaluation and the admission note from Austin State Hospital.

Q Okay. That is all that you were furnished from, Austin State Hospital?

[1349] A That's all I asked for, was the psychological evaluation.

Q Any reason to just limit yourself to that?

A It is most useful to me in terms of the fact that it is objective findings if there was any testing done.

Q Is the fact that those records may have shown other things, such as anti-social personality, anti-social behavior, would that be important to you in assessing this Defendant's mental status?

A It would be important in understanding the whole, try to explain or understand the whole person and there are such references in terms of doing a neuro-psychological, the most helpful to me is those things that are objective that are scores like I can look at.

Q You limited yourself to neuro-psychological? You are not trying to tell this jury that you are going to give them a picture of the person here, is that what you are saying?

A I asked for records that were psychological evaluations because from having looked at a lot of records, the treatment notes, and half the time you can't read them, they are not that [1350] valuable to me. I asked for what I thought would be the most important to me, whether it pertains to brain functioning or anti-social behavior, all of that is important to look at I think.

Q But, you didn't look at the rest of it?

A I looked at the psychological evaluations. If they had scores in them, I looked at that. If they had reference

to anti-social behavior, I looked at that. Anything in the psychological evaluation.

Q Did you see the Austin State Hospital records, any references to anti-social behavior?

A In the psychological report, there were no impressions given, and it is primarily concerning the scores and the psychological functioning does state that there was adjustment reaction of adolescence, and the admissions note, there was no direct reference to anti-social tendency in the impressions or the diagnosis from Austin State Hospital.

Q Did you see a history that was given in Harris County, that became part of his Austin State Hospital's records?

A Is that in the letter? I mean, is that part of the psychological, or part of the admissions note?

[1351] Q This document here, about four pages.

A That is a referral sheet. I don't recall seeing this, no.

Q Okay. You wouldn't disagree that, that is part of his Austin State Hospital records though, would you?

A No.

Q But, you weren't furnished that, were you?

A I asked for the psychological evaluation and the questionnaire that is filled out on intake.

Q Were you furnished his TDC records?

A No.

Q None?

A No.

Q Are you sure about that?

A Well, I didn't see his file from TDC, no.

Q You didn't see any of his files from TDC?

A No.

Q Okay. None of his mental health records from TDC?

A There was a psychological evaluation done at TDC.

Q Okay. Let me see that.

A Handing) Okay. Here is a psychiatric evaluation done at Diagnostic Center of TDC.

[1352] Q How many documents were you furnished concerning his TDC records?

A This psychiatric evaluation, and also, a neuro-psychiatric evaluation. Two.

Q Would you take those out? Could I see them, please? These records that I am holding in my hand now, are the only ones that you were furnished from the TDC records?

A It is the only ones that I asked for to review, the evaluations are the only ones that I have.

Q That wasn't my question.

A I have not seen other evaluations reports other than that.

Q You wouldn't play games with us, Doctor, or with this jury, about something this serious would you?

A No, Sir.

Q Do you know a Dr. Mount?

A George Mount?

Q George Mount.

A Yes I do.

Q A psychologist from Dallas?

A Yes.

Q You know that he came down and testified previously in an earlier proceeding in this matter?

[1353] A Yes.

Q He brought a stack of TDC records just about this high. Do you know that?

A No, I didn't know that.

Q Do you know that he testified that he got them from you?

A No, I didn't know that he testified to that.

Q Are you saying that he did not get those records from you?

A I did not review the TDC file.

Q Were you furnished the TDC file, Doctor?

A The TDC that I recall receiving was, that I looked at to formulate my opinion, were the psychological evaluation in terms of disciplinary reports, and if I had those, I passed them along.

Q Talking about mental health records from TDC, ten years worth?

A I did not review those.

Q Did you ever have them in your office?

A If I did, I passed them on to him, and didn't use them for my report.

Q Okay. If he came in this courtroom and testified right where you are sitting under oath that he got those from you, you are not saying that he is wrong, are you?

[1354] A No, I just didn't review them.

Q You just decided that it would be best that you not look at those so you couldn't come into this Court and not be cross examined on them, didn't you?

A That is not what I decided to look at.

Q Its not?

REPORTER'S NOTE: WHEREUPON STATE'S EXHIBITS NINETY-TWO, NINETY-THREE, NINETY-FOUR, NINETY-FIVE, NINETY-FIVE (A), AND NINETY-FIVE (B) WERE MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q I show you what has been marked as State's Exhibits Ninety-Two, Ninety-Three and Ninety-Four, is that the TDC records that you are telling this jury that you relied upon?

A That's correct.

Q I want to show you State's Exhibits Ninety-Five, Ninety-Five (A) and Ninety-Five (B), and were those – I am going to ask you about these records now. Were those furnished to you sent to your office?

A If I did –

[1355] Q By Defense Counsel?

A If I did, I don't remember those records, No, Sir.

Q You don't remember them?,

A No, Sir.

Q You remember getting a stack of records?

A In previous transcripts, and I did not review them for my evaluation.

Q Why not?

A I wanted to only to look at things that had scores that were objective findings to compare to what I found on testing.

Q But, they were furnished to you?

A I didn't review them and I don't remember if those were exactly the records that were the records that were furnished to me.

Q I see. But, if Dr. – what was his name again?

A George Mount.

Q He is a friend of yours up in Dallas, isn't he?

A Yes.

Q You sent him down here didn't you, before, to testify?

A I didn't send him down here.

Q You didn't have anything to do with recruiting him?

[1356] A I referred the attorneys to him.

Q Right.

A Yeah.

Q If he came in here in this courtroom and was sitting where you are sitting under oath and said, that this stack that is represented by State's Exhibit Ninety-Five here of the TDC records, that he got them from your office, would you dispute that?

A No.

Q You are just telling this jury that you did not look at those records?

A That's right. I did not look at those records or the records he obtained from me.

Q You just selected what you wanted to look at basically is what is amounted to, didn't you, Doctor?

A The psychological evaluations, Yes, Sir.

Q Yes, Sir, and if these records, State's Exhibit Number Ninety-Five contained ten years worth of mental health history-on this Defendant, ten years worth of meeting with psychologists on a regular basis, of seeing psychiatrists on a regular basis, numerous diagnoses, in there, you don't feel like that the information contained [1357] in State's Exhibit Number Ninety-Five is important to your evaluation?

A Those that have scores, the things that I like to look at that I can compare, then, I have something to compare to, that is the only –

Q All that is important here, all you are saying is important is numbers, you are telling this jury, 73, 62, whatever, that is important, that is what this man is, he is mentally impaired, and all of these records don't even mean anything?

A I don't remember saying that, Counsel.

Q Well, if you look through those records and you saw this Defendant's words all through them, whether he is talking to a psychologist, where he is talking about knowing about his case, and where he is talking about he understands the status of his case –

BY MR. SMITH:

Objection, reciting contents of documents not in evidence.

BY MR. PRICE:

Maybe we ought to let the doctor have some time to study these records.

Q You think it might help you?

[1358] A I don't think it would change my opinion about the examination that I conducted.

Q Do you think it might have some effect if those records indicated that he was a socio-path, a psycho-path?

A No, it wouldn't change the results of my examination, no.

Q Okay. Would that have something to do with the propensity to commit crimes?

A If he was a psycho-path or socio-path, overtures of personality disorders.

Q Right.

A Yes, that is an important part of the history of the individual that we would want to consider, sure. It is not – I didn't say these were not important. That would be an important part.

Q And, if those records throughout diagnosed him not only diagnosed him as a socio-path –

BY MR. SMITH:

Objection to the contents of the records, stating the contents of the records not in evidence before the jury.

BY MR. PRICE:

[1359] I can question him about something that he didn't even think was important to look at.

BY THE COURT:

Overrule the objection. Did you finish your question, Counsel?

BY MR. PRICE:

Not quite.

Q If those records contained diagnoses, numerous diagnoses, of him being a psycho-path, and also a wealth of information about where he had met with psychologists and psychiatrists that demonstrated and backed up those diagnoses, do you think that might be important?

A Important, and not inconsistent with my findings.

Q If you came in here and you are telling this jury that he is mentally retarded, and I believe if I am correct, that would be right towards the end of your testimony a while ago, that he was mentally retarded and that, that could be a contributing cause to the criminal acts, is that right?

A In so many words.

Q Is that what you told this jury on direct [1360] examination?

A That, it influences that he has engaged in criminal activities?

Q Psycho-path also, does the same thing, doesn't it, Doctor?

A Certainly.

Q And, that doesn't have anything to do with mental retardation in and of itself, is that right?

A It may have something to do with it.

Q You can be a psycho-path and have a high IQ or be a psycho-path and a low IQ?

A That's correct.

Q Ted Monday, he had a high IQ?

A Average from what I understand.

Q Finished college nearly got out of law school, didn't he?

A He was in law school.

Q He was a psycho-path, too?

A From what I understand, anti-social personality. disorder.

Q That has something to do with committing crimes doesn't it, Doctor?

A Yes, it does.

Q Very important factor, isn't it?

A It is an important factor in understanding criminal [1361] behavior.

Q I didn't hear you testify about what your opinion as to the personality of this Defendant?

A No, Sir.

Q Is that because you avoided looking at all of these other records?

A I wasn't asked the question.

Q Do you think he is a socio-path?

A I think his history borders on anti-social behavior, there is no doubt about that.

Q He is a psycho-path?

A That is an older term. Anti-social personality disorder is the newer term for diagnosis, diagnostic and – .

Q Just like you were using brain damage and brain impairment, is that an older term and new term, and psycho-path, socio-path, anti-social personality are all the same thing?

A They are approximately the same thing, Sir.

Q In other words when you professionals change the terminology from psycho-path to anti-social personality, you didn't change the requirement or the definition of the individual?

A Well, actually they did change, the criteria but, I don't think it is a substantial change. [1362] They did change some of the criteria.

Q Didn't change – when it changed the name, I just created a new category, is that what you are telling us?

A No, they changed it so that in order to diagnosis an anti-social personality disorder, it became a checklist of acts that occurred prior to the age of fifteen, and then, also, there is a separate set that occurs after the age of fifteen. When they called it psycho-path, it was more of a subjective category that was not linked as closely to the individual's behavior. So, they changed it and it is essentially as I said, essentially the same thing.

Q But, now, in order to diagnosis somebody anti-social, it is a certain trait that has to occur prior to a certain age, is that correct?

A Yes, that's correct.

Q Johnny Paul Penry has demonstrated that, it occurred prior to that age, isn't that correct, Doctor?

A There are several of those acts or behaviors that are found in his history prior to the age of fifteen, that's correct.

Q Okay. For example, we were talking about a moment [1363] ago, Austin State Hospital. You weren't

furnished some of the records. I believe that you said earlier, and I am showing you a document that is dated August 24, 1973, and it was done down in Harris County Mental Health Screening Service, intake history. Part of his Austin State Hospital records that you didn't see, is that correct?

A Yes, Sir, that intake history questionnaire, no.

Q Okay. That indicates that he was charged with arson, does it not at that time?

BY MR. SMITH:

Objection, Your Honor on the grounds previously urged that I made this morning.

BY THE COURT:

Overrule the objection.

Q That indicates that he was charged with an arson, does it not?

A Yes, Sir.

Q Isn't arson one of the traits or activities of anti-social personality?

A Yes, especially prior to the age of fifteen, and that was referred to in the report that I have reviewed from Austin State Hospital.

Q Oh, it was?

A Yeah.

[1364] Q Okay. But, he had been charged with an arson? Also, did you see early acts of homosexuality in Mr. Penry?

BY MR. SMITH:

Same objection, Your Honor.

BY THE COURT:

Overrule the objection.

A That was referred to in the report I believe, from either Austin or it could have been from Rusk, as well as a previous evaluation, those acts were in summary of what I think the intake questionnaire is easily summarized in the report, and it was referred to in the records that I reviewed.

Q So, you were aware that he was an arsonist, he had committed homosexual acts is that right?

A That is what it stated.

Q Also, aware that he is a runaway?

A It said in the records that he had, on more than one occasion, had runaway from home, that's correct.

Q That is another trait of anti-social, isn't it, in children?

A Under the age of fifteen, yes, it is.

Q Okay. You also see acts of violence and cruelty [1365] towards other siblings, in his record?

A There was a referral to an act involving his brother, I believe, in one of the reports.

Q What kind of a referral was that to his brother?

BY MR. SMITH:

Objection, Your Honor. Can I approach on that one?

BY THE COURT:

Yes, Sir.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH.)

BY MR. SMITH:

I want to record my objection to the Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution, and corresponding clauses of the Texas Constitution and the Texas Code of Criminal Procedure. This is an attempt to pry out highly prejudice information before the jury, which has no bearing on the witness' testimony, and is grossly prejudice and a violation of due process.

BY THE COURT:

What is it that you are questioning [1366] him about, the homosexual acts, Mr. Price?

BY MR. PRICE:

Yes Sir.

BY THE COURT:

The objection is sustained, then.

BY MR. BROWN:

Reply to that objection?

BY THE COURT I asked him what he was questioning him about.

BY MR. PRICE:

Questioning him about these records, Judge.

BY THE COURT:

What acts are you trying to bring out?

BY MR. PRICE:

The fact of the prior – I don't know he said he saw some acts, and I was just wondering what he was talking about. I didn't have any idea what he was talking about. He referred to it himself, and I just asked what act it was.

BY THE COURT:

[1367] Go ahead and ask the question. Objection is overruled. (END OF CONVERSATION HELD AT THE BENCH.)

Q What act was that, Doctor, concerning his brother?

A Something about picking the skin off of his feet.

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBER NINETY-SIX WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q I show you what has been marked as State's Exhibit Number Ninety-Six, records from the Austin State Hospital, I have already asked you about this intake information, history that was from Harris County and I believe that you were not furnished that, is that your testimony?

A That's correct.

Q Now, I want to refer to a letter dated August 15, 1973, to a Mr. Leikam, from a psychiatrist, I believe. Were you furnished that?

A That was from Dr. Bell?

Q Exter F. Bell, that's correct.

A Yes, I have reviewed that.

Q That was part of the records that was furnished [1368] to you?

A Yes. I have a copy here.

Q Does that letter refer to him having been a fire starter, setting fires at an early age?

A It refers to the fact that he was charged with an arson.

Q Look over on Page 2, second paragraph. What does that say?

A "He stated that he had set fires on three occasions, when he was mad at someone."

Q And, he was charged with an arson at the time, also, wasn't he?

A At the time of the letter, I believe, also.

Q This is a letter from the psychiatrist to his lawyer, isn't it?

A To the attorney for Johnny Paul Penry?

Q Yes.

A I assume that is who that is.

Q Right. He is seventeen years old at that time, wasn't he, Doctor?

A 1973? Seventeen, right.

Q And, it says, that he is charged with an arson and he set fires on three different occasions previously because he was mad at somebody, is that right?

[1369] A That's correct.

Q Did you review his Rusk State Hospital records?

A The psychological evaluation that was completed at Rusk, on October 23, 1973.

Q Is that one document?

A Yes, Sir.

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBER NINETY-SEVEN, WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q Would you mind taking out the record that you were furnished from Rusk State Hospital?

A Okay.

Q Is that it?

A This is it.

Q Is it just one document, or several records?

A Three pages.

Q Three pages?

A Yes, that's correct.

Q Okay. This has got more records there represented by State's Exhibit Number Ninety-Seven, is it not, Doctor?

A There are more pages here, Yes, Sir.

Q There is even a kind of a daily history of notes from nurses and things of that nature, on the [1370] ward, reporting his conduct in this State's Exhibit Number Ninety-Seven, is it not?

A Like for me to recite this, probably had progress notes and admission records, psychological evaluations, doctor orders, progress records.

Q Progress records are actually notes of what he is doing on a day to day basis, there is it not?

A It appears from the nurses concerning his activities when he was in the hospital, if he was asleep, whether they check on him or not, and what he was doing.

Q How about if he was setting fire to another patient?

A If you want me to look for that in here –

BY MR. SMITH:

We would object to that question.

BY THE COURT:

Overrule the objection.

BY MR. SMITH:

On the ground previously urged at the bench.

Q See if you can find this page, Doctor?

A No page numbers on it. Is it towards the [1371] front?

Q About the twelfth page down, entries dated November 23, 1973. You got it there?

A Yes.

Q Okay. That top line says, "This patient was caught in the back of the dormitory, along with two other adolescents, beating up on another boy, from the adolescence unit."

BY MR. SMITH:

Renew my objection, under the Confrontation Clause, reading from a document not in evidence, and not been reviewed by this witness.

BY THE COURT:

Objection is overruled.

BY MR. PRICE:

Your Honor, to satisfy Counsel, we would offer into evidence, State's Exhibit Number Ninety-Seven, which is the Rusk State Hospital records.

BY MR. SMITH:

Can I see the document?

BY MR. PRICE:

Don't lose our place.

BY MR. SMITH:

[1372] Alright. We object to hearsay in Confrontation Clause to the hearsay objection, Your Honor.

BY THE COURT:

Is that the only objection that you have to it?

BY MR. SMITH:

Also, under Estelle vs. Smith, and to 805 it contains hearsay within hearsay. I refer to the constitutional amendments that I mentioned and the statutory provisions that were mentioned in our conference at the bench.

BY THE COURT:

Okay. State's Exhibit Number Ninety-Seven, is admitted over the Defendant's objection.

Q Does that entry there on November 23, 1973, state this patient was caught in the back of the dormitory with two other adolescents, beating up on another boy from the adolescence unit?

A That is what it looks like. I can't tell quite what that word is.

Q Let me read it again.

[1373] A "Beating on another boy from the adolescence unit." Yes, Sir.

Q Beating on another boy?

A Not beating up on, okay. I see, I'm wrong.

Q Flip over two pages to October 22, 1973.

A That would be back two pages, right?

Q Forward.

A Is in chronological order, because this is November of '73. So, it would be back.

Q Okay. Find the October 18 – or October 22nd, '73, entry.

A Looks like it is out of order. This is it. It is out of order.

Q Indicating that he was in a fight with some other patients?

A It says, "In an attempt to modify his socially unacceptable behavior of fighting."

Q That is what the entry says?

A Yes. It starts off with saying that he was restricted for twenty-four hours for scuffling with another patient, and that he was restricted from social activities except special ed, vocational ed, and work details in an attempt to modify his socially unacceptable behavior of fighting.

[1374] Q Find October 7th entry there?

A October the what?

Q 7th.

A Okay.

Q What does that entry say about his socially unacceptable behavior? What kind of socially unacceptable behavior do they refer to there?

A On what day?

Q October 7th.

A Okay. "Johnny has company, aunt and father and two sisters."

Q I ask you about the socially unacceptable behavior if you will drop down right below that you will see it.

A "Johnny is being –" I don't know what that says, "On a twenty-four hour restriction from all social activities except special education and vocational education classes with work detail on hospital, III, in an attempt to modify his socially unacceptable behavior of setting fire to other patients."

Q "Setting fire to other patients." Not to a building but, to people, is that right? Is that correct?

A That is what it says.

[1375] Q What is the date on that entry?

A October 7, 1973.

Q You didn't review that record?

A No, I didn't review the progress notes.

Q Okay. I ask you to find this progress record here.

A Does it have a date or something on that?

Q I show it coming right after the October 12th, entry, but, I'm not sure our records are the same.

A Okay.

Q Direct your attention to about the fifth or sixth line down, one, two, three, four, five, six, seventh line down, refer to him setting fire to an apartment?

A Okay. I found the place.

Q Okay. Does it refer to him previously set fire to an apartment in Houston, is that correct?

A Yes, that's correct.

Q Right down below that, where the next paragraph starts, what is the first sentence there say?

A I give up.

Q Let me try it. "He admits that he likes the sound of sirens and fire trucks rushing to the [1376] fire,"

A Okay.

Q Would you agree with me on that?

A Yeah, that is what it looks like to me.

Q Okay. Is that anti-social?

A That is a sign of anti-social behavior, sure is.

Q See if you can find this entry here, 10/03/73.

A That is the next page?

Q Refer again to arson and had runaway from home, about the middle of that top paragraph?

A Okay.

Q Does it refer again to arson and having runaway from home?

A It is another incomplete sentence. It just says "Arson (had runaway home)."

Q Okay. Arson and running away from home are both signs, or indicators in an anti-social personality, are they not?

A Especially before the age of fifteen.

Q We already read out of the reports that at seventeen that he was charged with an arson, and that he had admitted to setting three previous fires, is that correct?

A That is what the record shows, yes.

[1377] Q Can you find this? Maybe you were furnished this one, psychological evaluation, but, were you furnished that one?

A Yes.

Q What is the diagnostic impression, on that one?

A Diagnostic impression, mental retardation, mild, complicated by organicity and deprived social background.

Q Okay. Look up above there where it is referring to the intellectual level. What does it say about his intellectual level, first sentence?

A "Upper mild mental retardation, WAIS Performance indicates functioning in upper mildly retarded level. Bender points to clear organic involvement. Human figure supports impression of retardation with organicity."

Q And, if you would look over to the IQ scores over there. Were you furnished those?

A Yes, I have that.

Q Okay. Were these incomplete also?

A I didn't see the protocol from it.

Q You don't know whether they were complete or not?

[1378] A Let me check that before I say that. There was one of these that said it was a brief form, but, there is no indication in this one, from Rusk, that they omitted any of the sub-test.

Q And, what was his performance IQ on that at that time?

A Performance IQ was 74.

Q And, you say there is a plus or minus how much error built in – these tests?

A On the performance sub-test, on the performance IQ there, the DSM-3 says we add plus or minus five points.

Q I thought you said, five or six. Is one or the other?

A Well, it is actually on the verbal, it is only suppose to be four and on the performance it is six, but, if they stay at five, the DSM-3 but, either four or five, but, they say five.

Q At one time you all thought only it was a three point variance, is that right?

A On the WAIS, or the WISC?

Q You tell me. What is that, the WAIS?

A This one is the WAIS, yes, that's correct.

Q Is that five or six or a three point error?

A On the IQ scores it is a five. On the sub-test [1379] scores it is three. So, two different things.

Q Okay. So, he had a performance of 74, that could mean either a 79 or a 69. Is that where that range – is that what you are talking about?

A Well, this is what you would say if you would look at this IQ score and learned, you would say that you would be ninety percent sure that on the WAIT, his performance wouldn't be 69, 78 also on the performance.

Q What type of IQ test did you do?

A The updated version.

Q What did you show his performance IQ to be?

A 66.

Q About eight points under what this tests shows, is that correct?

A That's correct.

Q A little more than the margin of error, sometimes?

A Well, when they changed the test, and they standardized it, it tends to be a little bit different and to make exact point by point comparisons, we get into some statistical things that I think would be complicated, but, it would show that five or six points either way is at the range we had rather want to look at different terms of level and those are [1380] roughly – those two tests and those two scores you brought into question are not inconsistent in my opinion.

Q Okay. Did you state that in your opinion, that he was an anti-social personality.

A I didn't state that, no.

Q Well, let me ask you in your opinion, does he have anti-social personality?

A He has anti-social history, and that the acts true category would certainly say that his history was positive for anti-social behavior, and I would have no argument with that in any way whatsoever.

Q He has been diagnosed as that?

A That and saying anti-social tendencies, history, with an anti-social behavior, fairly frequently, since, and especially the age of seventeen, had been.

Q You don't have any dispute with the fact that he is anti-social?

A Don't have any dispute with the fact that his history is positive for anti-social behavior at all, no.

Q Have you ever diagnosed anybody as being anti-social personality?

[1381] A Most assuredly.

Q You are not saying that about him, you are having trouble saying that and I just want to know if you can or can't.

A It wouldn't be my first diagnoses, but, I certainly would say, clear cut anti-social tendencies, and history positive for anti-social behavior wouldn't be on the basis for my results, my first diagnosis.

Q I understand what you are saying, but, you are saying that he has clearly got the tendency, but you just can't come out and say that lie is an anti-social personality?

A He is mentally retarded with organic involvement and a history positive for anti-social behavior, that is my diagnosis.

Q Okay. But, you can't – you just won't say that he has got an anti-social personality in your opinion?

A In that category, that is a lot different kind of people. He looks more like people with brain damage that I have seen than those with anti-social personality.

Q Does brain damage preclude someone from being anti-social also?

[1382] A Only the behavior is something to correlate.

Q Mental retardation preclude somebody from being anti-social personality?

A No.

Q Okay. Lets see. We went through Austin and Rusk. You see his records from the Texas Rehabilitation Commission?

A Yes, I did.

Q Have you got those there?

BY THE COURT:

While he is looking for those records, you all approach the bench for just a moment.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY THE COURT:

You got very much more?

BY MR. PRICE:

Yes, Sir, a lot more with him.

BY THE COURT:

Are you going to have any redirect?

BY MR. SMITH:

Don't know yet.

BY THE COURT:

[1383] You want to stay awhile? You, got over thirty minutes?

BY MR. PRICE:

Yes, Sir, probably a good hour or better, take him through every bit of these records.

BY MR. SMITH:

For the record, while I am up here, I object to making him read aloud every record that Mr. Price thinks might be relevant to the case, has nothing to do with his direct testimony.

BY MR. PRICE:

Offering these records under all completeness.

BY THE COURT:

Don't ask him to read them any more until you offer them.

BY MR. PRICE:

I won't do that, Judge.

BY THE COURT:

Alright. You don't have any problem with recessing now and coming back in the morning?

BY MR. SMITH:

• • •

[49:1403] DR. RANDALL PRICE

being continued as a witness having testified previously, and this being a continuation of his testimony under oath.

CONTINUED CROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q Would you restate your name for the jury, please?

A Yes. I am Dr. Randall Price.

Q And, I believe that you are the same Dr. Randall Price that testified yesterday afternoon, is that correct?

A Yes, that's correct.

Q Did you get a night's sleep, Dr. Price?

A Yes, thank you.

Q Good, good. Did you have a chance to look at any more records on the Defendant's last night?

A No, I did not.

Q Okay. Still talking about the same records, we were yesterday. Okay. By chance, did you pick up, it was your own record, but, I had two or three documents marked as State's Exhibits. Did you by chance pick those up?

A I will check and see. I thought that I had it straight, but, I can check through here and see. [1404] If there are some actually – these were, I think the copies that I had and then they were marked as State's Exhibits after that.

Q Yes, Sir. The only thing I am going to ask that those documents, as well as several more from your file, probably be introduced into evidence, with the understanding and agreement that, we will substitute copies, we will make copies, in other words, at a recess or something and give you back all of your originals.

A Okay.

Q For the time being, we will need to keep those out.

A Okay.

Q Could you, maybe, lets start off by letting you tell us what records you relied on. What records were presented to you that you actually reviewed and used in preparation for your testimony in this case?

A Okay. A psychological report from University of Texas – from the University of Texas Medical Branch in Galveston, dated August 25, 1965.

A letter to the Austin State School from the University of Texas Medical Branch in Galveston dated 5/02/66.

[1405] A psychological report from the Mexia State School dated July 8, 1968.

A set of records from Sam Houston School and from the Goose Creek Independent School District dated – one was an educational prescription dated June 10, 1971, and the other one is a appraisal report dated January 23, 1973.

A letter from –

Q Excuse me a minute. That is an appraisal report, part of the Goose Creek records?

A I believe it is, Yes, Sir.

Q Okay.

A A letter from Dr. – and his last name is Bell, I don't have the first name here, to an attorney dated August 15, 1973.

A psychological evaluation from Austin State Hospital dated September 13, 1973. Also, and evaluation of on admission, Austin State Hospital, dated September 17, 1973.

A psychological evaluation for Rusk State Hospital dated October 23, 1973.

A psychological evaluation from the I think it was the Deep East Texas MHMR Facility, dated November 17, 1976.

A psychiatric evaluation from Dr. Pebbles [1406] dated May 19, 1977.

A psychiatric evaluation from TDC dated August 24, 1977.

A psychological evaluation dated September – excuse me, it was September 18, 1979, from the Texas Rehabilitation Commission, and a psychiatric evaluation from TDC dated 1/24/88.

Q The test that you gave this Defendant, do you have those with you also, copies of the tests?

A Well, I have the protocol here.

Q Okay. That is the paperwork that backs it up?

A I don't have the actual test here.

Q Would you explain to the jury what the protocols are?

A Sort of like the answer sheet, where you would write down the responses and any observations and score. Sort of like an answer sheet.

Q The actual test themselves, are – well, one of them was this puzzle that you showed the jury yesterday?

A Yes.

Q Of course, that wouldn't have any kind of a report on that, other than how he performed?

A That's right.

[1407] Q That is the protocol?

A Yes, Sir, that's correct.

BY MR. PRICE:

I don't want to take up any time now, but, I think I am entitled. Counsel, could I get a copy of his tests and matters of that nature at the next recess or something?

BY MR. SMITH:

I'm sure you can and if it is not here, we will get them.

Q Did you bring them with you?

A I have all of them here.

BY MR. PRICE:

We will get them after a while.

Q I believe you just testified that you did receive some records from UTMB, Galveston, back in 1965 that you used in examining this Defendant, is that correct?

A Yes, that's correct.

BY MR. PRICE:

We would offer into evidence, State's Exhibit Number Ninety-One, which is the records of this Defendant, UTMB Galveston, back in the sixties, which is previously been introduced in a prior [1408] proceeding in this matter as Defendant's Exhibit Number Seven.

BY MR. SMITH:

Can we approach, Judge?

BY THE COURT:

Yes, Sir.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

This is, I believe there is a good deal of hearsay within hearsay, here and there are parts of this document that are inadmissible, but, I would need to review it with more care, if I could sit down and read the whole thing, though, if you want to take a look a while, but, my recollection is that there is hearsay from his mother in here.

BY MR. PRICE:

Might be a letter or something like that in there, but, I don't think there is any –

BY MR. SMITH:

Why don't you go ahead and question [1409] the witness now, and if I have a problem with one of these questions, I will say so and we will hold it over until later.

BY THE COURT:

Well, I am going to admit it, subject to you having the opportunity to object to any part of it, if there is something there, we will take it up and if there is something

that he is on, you stand up and you all can approach the bench.

BY MR. PRICE. I am not going to take him into it. I just want to offer the records, is really all I am doing.

BY THE COURT:

Any objection on that basis, that you have the opportunity to go over it, and if there is something there that hasn't been talked about?

BY MR. SMITH:

Some parts of it, are admissible, and I am not objecting to the whole thing, but, there are possibly some there. We have all of those documents, don't have them in that record, like stapled together like that in that order.

[1410] BY MR. PRICE:

It is your exhibit.

BY MR. SMITH:

He has got a point, but do me a big favor and make a copy at the break and I would appreciate it.

BY THE COURT:

Okay. END OF DISCUSSION HELD AT THE BENCH.)

BY THE COURT:

State's Exhibit Ninety-One is admitted without objection.

Q Now, could I see your records from UTMB?

A (Witness Handing).

BY MR. PRICE:

Mark this as one exhibit.

REPORTER'S NOTE: WHEREUPON STATE'S EXHIBIT NUMBER NINETY-ONE (A) WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

BY MR. PRICE:

I offer into evidence, really, I think all of these records are the same as State's Exhibit Number Ninety-One, but, Ninety-One (A), at least for the purposes of the record, being the documents [1411] relied on by Dr. Price, from the University of Texas Medical Branch in Galveston.

BY MR. SMITH:

Can we approach, Your Honor?

BY THE COURT:

Yes, Sir.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING DISCUSSION WAS HELD AT THE BENCH.)

BY MR. SMITH:

He is certainly entitled to question the witness by what he relied on, no problem with that. I do object to the letter, which is the last two pages here, going into evidence. It contains hearsay, within hearsay, to wit, the

possible description by his mother of Johnny as a child and in violation of the Confrontation Clause, Fifth, Sixth, Eight and Fourteenth Amendments of the U.S. Constitution.

BY MR. PRICE:

Offer it as a business record, as medical records and as a record that he has relied on in this case to give his opinion. This may be hearsay, obviously, [1412] most records are hearsay, but is is a record of the University of Texas Medical Branch in Galveston –

BY MR. SMITH:

It is not the business records or medical information. It must be shown that it was information transmitted by someone at or near the time that it happened. That doesn't meet that test. It is not an exception to the Hearsay Rule.

BY MR. PRICE:

We agreed not to have that kind of an objection.

BY MR. SMITH:

I don't think so, Judge.

BY THE COURT:

I am going to admit Ninety-One (A) over your objection.

(END OF CONVERSATION HELD AT THE BENCH.)

BY THE COURT:

State's Exhibit Ninety-One (A) is admitted over the objection of the Defense.

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBERS NINETY-NINE AND NINETY-NINE (A) WERE MARKED [1413] FOR IDENTIFICATION BY THE REPORTER.)

Q Would you give me the records that you had from the Mexia State School?

A (Witness Handing).

Q Is this the only one?

A Yes.

BY MR. PRICE:

Mark that as Ninety-Nine (B).

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBER NINETY-NINE (B) WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

BY MR. PRICE:

I offer into evidence, Your Honor, State's Exhibit Numbers Ninety-Nine and Ninety-Nine (A) which are the records of the Defendant from the Mexia State School, which have previously been introduced in a previous proceeding as Defendant's Exhibits Five and Five (A), and we would offer also into evidence, State's Exhibit Ninety-Nine (B), which is the Mexia records relied upon by this witness.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING [1414] CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

Okay. As I understand it, the offer is Ninety-Nine, Ninety-Nine (A) and (B)?

BY MR. PRICE:

That's correct.

BY MR. SMITH:

Ninety-Nine (A) is the thickest of the documents. I have looked through it, but I would ask the same courtesy I was given a minute ago, a chance to look at it at the break and if I find something that I should have objected to, if I wish to raise it later,

BY MR. PRICE:

In fact, to expedite matters, Bob, if you want to, I don't intend to take him through all of these records to any extent. I want to get them all in and I want to do that before the jury, but, asfaras if you want to go through the records at the recess or something and look for something that you don't feel like is admissible, well, I can offer [1415] it with the agreement that you all can look through it and we will take it up with the Court later, and I will agree not to exhibit it to the jury.

BY THE COURT:

You will agree not to exhibit it to the jury?

BY MR. PRICE:

Exhibit it to the jury, and if we get down to something that I am going to exhibit to the jury, I will show it to Defense Counsel first and give him an opportunity to object.

BY MR. SMITH:

I am not quite sure where we stand, Judge. I can make some objections now, and reserve – I might even do that, and I will make it this way.

Ninety-Nine (A) I just want the chance to look through at the break.

BY MR. PRICE:

No problem.

BY MR. SMITH:

As to Ninety-Nine, Judge, I object essentially on the hearsay ground, hearsay [1416] within hearsay grounds previously stated. Also, the Confrontation Clauses, Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution, Texas Constitution, and Texas Code of Criminal Procedure. I object to Page 16.

BY THE COURT:

I am going to go ahead and look at these other three now while I have got it.

BY MR. SMITH:

Just for the record, that is Page 25, the entire document.

BY MR. PRICE:

Is that a document from another institution? From UTMB, Galveston, probably already introduced in that exhibit, I'm sure, and another copy of the same document.

BY THE COURT:

Okay.

BY MR. SMITH:

I am going to object to these documents on Page 18, the entire document on Page 25, and the document which begins at Page 31, and I would state, Judge, I object to these three exhibits and Mr. [1417] Price if a document is duplicated in there, and objected to it, once, I don't waive any objection by not making it some other time.

BY MR. PRICE:

Correct.

BY MR. SMITH:

Okay.

BY MR. PRICE:

The document, Page 31, and the document on Page 25, that is Mexia. On Page 31, we don't have any objection to withdrawing or we will agree to withdraw Page 31 out of there because that appears to be a document from the University of Texas Medical Branch in Galveston, but, the other documents –

BY THE COURT:

You want to take that out now?

BY MR. PRICE:

Oh. Mexia. They are Mexia State School records, apparently.

BY THE COURT:

You want to just – is that the agreement that you are agreeing to, take [1418] it out and I will rule on it.

BY MR. PRICE:

We will take that Page 31 out of it.

BY MR. SMITH:

31 and 32.

BY THE COURT:

Alright. State's Exhibit Ninety-Nine is admitted over the objection of the Defendant.

BY MR. SMITH:

As to Ninety-Nine (A), Judge, that is the one, if I could have the courtesy of looking at it for details, but, still I have an objection that the document that begins at Page 39 and ends at Page 40, I will object to that.

BY MR. PRICE:

Is that okay, we will agree to take that one out, Judge. Appears to be a document from the University of Texas Medical Branch and probably ought to offer it under the other one. I am taking that page out.

BY THE COURT:

Is that all of the objections subject [1419] to looking at it?

BY MR. SMITH:

As to Ninety-Nine (A), that's right. There is some other documents on the inside of the front folder, documents beginning at Page 4, going to Page 7, and I –

BY THE COURT:

Tell me what it is.

BY MR. SMITH:

That is a document in hand-writing, I think, is his mother's hand-writing, an application to the school.

BY MR. PRICE:

That would be part of their records.

BY MR: SMITH:

They are history.

BY THE COURT:

Ninety-Nine (A) is admitted over your objection, subject to anything that you haven't had a chance to look at yet. Ninety-Nine (B) any objection?

BY MR. SMITH:

Ninety-Nine (B), yeah, I do, object to the hearsay grounds.

[1420] BY THE COURT:

Ninety-Nine (B) is admitted over your objection.

BY MR. SMITH:

Hearsay, Your Honor, I am asserting the constitutional grounds that I stated earlier.

BY THE COURT:

Yes, Sir.

(END OF CONVERSATION HELD AT THE BENCH.)

QUESTIONSBY MR. PRICE:

Q State's Exhibits Ninety-Nine and Ninety-Nine (A) represents the Mexia State School records and I believe State's Exhibit Ninety-Nine (B) is the document that you were furnished from Mexia is that correct?

A Right.

Q Okay.

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBER ONE HUNDRED WAS MARKED FOR IDENTIFICATIONBY THE REPORTER.)

Q Would you give me the Goose Creek records that you relied on?

A (Witness Handing).

[1421] Q Okay. A couple of different documents, is that correct, multiple page documents?

A Yes, that's correct.

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBER ONE HUNDRED (A) WAS MARKED FOR IDENTIFICATIONBY THE REPORTER.)

BY MR. PRICE:

Your Honor, we would offer into evidence State's Exhibit Number One Hundred, which represents the

Goose Creek Independent School District records of the Defendant, previously introduced in proceedings in this matter under Defendant's Exhibit Number One. We also offer State's Exhibit Number One Hundred (A) represents the Goose Creek Independent School District records and/or Sam Houston School records that were relied upon by this witness in this case.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

[1422] We have no objection to One Hundred (A), Your Honor. As to Exhibit One Hundred, Mr. Price, has agreed not to exhibit it to the jury for the moment, and, I will review it at our break.

BY THE COURT:

State's Exhibit One Hundred is admitted without objection, with the understanding that before any part of it is exhibited to the jury, that the Defense will be given an opportunity to make further objections. One Hundred (A) is admitted without objection.

(END OF CONVERSATION HELD AT THE BENCH.)

Q Again, showing you One Hundred, Goose Creek Independent School District's records, and you relied on State's Exhibit Number One Hundred (A) is that correct?

A That's correct.

Q Okay. I believe you said that you also relied on a letter from Dr. Bell to an attorney is that correct?

A That's right.

Q What part of the record did that come from, do you have any idea?

[1423] A I don't know what part of the record that it came from, no. It was a psychiatric evaluation.

Q I show you what has previously been marked as State's Exhibit Number Ninety-Six, which represents the Defendant's records from the Austin State Hospital and it has previously been introduced in prior proceedings in this case as Defendant's Exhibit Number Eight.

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBER NINETY-SIX (A) WAS MARKED FOR IDENTIFICATIONBY THE REPORTER.)

Q And, referring you to Page 11 of that document, and then, I am going to show you what has been marked as State's Exhibit Number Ninety-Six (A) which is the letter that you said that you relied upon from Dr. Bell, and I just ask you is this letter that you relied upon, State's Exhibit Number Ninety-Six (A), the same letter that appears on Pages – well, 11 through 13 in that document, State's Exhibit Number Ninety-Six?

A It appears to be, yes.

Q Okay. Got any question about that?

A No.

Q Appear to be the same letter? Take your time.

A Yes, same letter.

[1424] Q In addition, were there other records from the Austin State Hospital that you relied upon?

A (Witness Handing).

Q Okay.

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NINETY-SIX B WAS MARKED FOR IDENTIFICATIONBY THE REPORTER.)

Q I show you what has been marked as Exhibit Ninety-Six (B) and is that the other document or couple of documents from the Austin State Hospital, I believe, two different documents, or several documents that you relied upon?

A There are two I think. Yeah, those are the documents from Austin State Hospital.

BY MR. PRICE:

Okay. At this time, Your Honor, we would offer into evidence, State's Exhibit Number Ninety-Six which is the Defendant's records from the Austin State Hospital, previously admitted in prior proceedings as Defendant's Exhibit Number Eight and also offer State's Exhibit Number Ninety-Six (A) which is a letter from a Dr. Bell relied upon by this witness in examining [1425] the Defendant, and is part of State's Exhibit Number Ninety-Six, the Austin State Hospital records and offer into evidence, State's Exhibit Ninety-Six (B), which contains two other documents relied upon by this witness contained in the Austin State Hospital records, and we will agree, Your Honor, in the interest of time, not to present any of the

records to the jury, until Counsel has had an opportunity to go through them.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

As to Ninety-Six (A) and Ninety-Six (B), Your Honor, while I do not object to use them to question the witness, I do object to the Confrontation Clause hearsay, and constitutional grounds, Fifth, Sixth, Eighth and Fourteenth Amendments and the other provisions mentioned earlier, as coming into evidence, and indicate as to Ninety-Six I will have to reserve my objections [1426] until I have had a chance to review them.

BY THE COURT:

Ninety-Six (A) and (B) are admitted over the objections and Ninety-Six is admitted over the objection also.

(END OF CONVERSATION HELD AT THE BENCH.)

Q Again, I believe Ninety-Six (A) and (B), constitute the records furnished to you by Austin State Hospital, State's Exhibit Ninety-Six or what we claim constitutes the records up there, is that agreeable?

A Those are records that I reviewed, Yes, Sir.

Q Do you mind giving me the records that you had from the Rusk State Hospital, please, Sir?

A (Witness Handing).

Q Thank you. You are ahead of me.

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NINETY-SEVEN (A) WAS MARKED FOR IDENTIFICATIONBY THE REPORTER.)

Q I show you now what has been marked as State's Exhibit Ninety-Seven (A), and ask you are those the documents furnished to you and upon which you relied on in examining this Defendant and the Defendant in this case?

A Yes, that's correct.

[1427] Q How may documents? Is that three pages?

A Yes, correct.

BY MR. PRICE:

Your Honor, at this time, we would offer into evidence State's Exhibit Number Ninety-Seven, the Defendant's records from the Rusk State Hospital, previously introduced in prior proceedings in this case as Defendant's Exhibit Number Two, and, also offer into evidence Ninety-Seven (A) which is the records that this witness relied upon.

BY MR. SMITH:

Again, Your Honor, we would agree with respect to State's Exhibit Number Ninety-Seven, that allows Counsel an opportunity to review it and make objections. We will agree not to present it to the jury at this time.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

On Ninety-Seven, we reserve our objection to it. On Ninety-Seven (A) see it for a second. We object to the [1428] document and specifically to the reference as to the fire to the apartments in Houston, fire setting in Houston, that is hearsay evidence and no indication of its source or reliability, and we object to the Confrontation Clause, Fifth, Sixth Eighth, and Fourteenth Amendments and the other provisions stated earlier.

BY THE COURT:

Ninety-Seven (A) is admitted over your [1429] objection, and Ninety-Seven is admitted – it was admitted yesterday, and it is admitted again, we the right that you will have the right to look at it over your objection.

BY MR. SMITH:

Alright.

(END OF CONVERSATION HELD AT THE BENCH.)

A And, it was actually from Dr. Pebbles, also, MHMR.

Q I think they are in. Can I see your MHMR records?

A (Witness Handing).

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBERS ONE HUNDRED ONE AND ONE HUNDRED ONE (A) WERE MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q Dr. Price, I am going to show you first of all what has been marked as State's Exhibit Number 101 (A), and

ask you are those the documents from MHMR that you relied upon?

A Yes, they are.

Q Now, I want to show you State's Exhibit Number 101, and I am going to direct your attention to a couple of documents in there that I marked already about half way through, The first [1430] document there, does that appear to be the same document that is a letter from Dr. Pebbles, that is part of State's Exhibit Number 101 (A)?

A Yes, it appears to be.

Q And, if you would, the next document does that appear to be the same document in 101 (A) which is a document signed by Mary Cochran, psychologist?

A Yes, it is.

BY MR. PRICE:

Your Honor, we would offer into evidence, State's Exhibits 101, the Defendant's records from Texas Department of Mental Health and Retardation in Polk County, and State's Exhibit Number 101 (A) which is the document which the witness relied upon.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. PRICE:

Judge, for the purposes of the record, for all of these exhibits, on the Punishment Phase Exhibits, we would agree for Counsel to make objections out of the presence of the jury.

BY MR. SMITH:

[1431] As to 101 (A), Judge, we object on the grounds of insufficient, we usually go earlier, and also, the Fifth Amendment etc.

BY THE COURT:

State's Exhibit 101 (A) is admitted over the Defendant's objection, and 101 is admitted over the objection, subject to making further inspection of it.

BY MR. PRICE:

Yes, Sir. For the purposes of the record, I might add that State's Exhibit 101 has previously been introduced in these proceedings under Defendant's Exhibit Number Four.

(END OF CONVERSATION HELD AT THE BENCH.)

Q Do you have any Texas Rehabilitation?

A Yeah. (Handing).

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBERS 102 AND 102 (A) WERE MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q Dr. Price, I will show you what has been marked as State's Exhibit 102 (A) and ask you if that [1432] is the document that you relied upon in this case?

A Yes, it is.

Q I don't believe that document is contained in State's Exhibit 102, is it?

A I don't think so. I didn't see it when you were going through it.

BY MR. PRICE:

Your Honor, apparently State's Exhibit 102, which has previously been introduced as Defendant's Exhibit Number Three in a prior proceeding as the records of the Rehabilitation Commission does not contain the document marked as State's Exhibit 102 (A) which was relied upon by Dr. Price. In any event, we would offer State's Exhibit 102 and Exhibit 102 (A) as being the records of the Defendant's from the Texas Rehabilitation Commission.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. PRICE:

Judge, we have documents out there, [1433] that we have since supplemented, and I want to ask the witness.

Q Again, to compare State's Exhibit 102 (A) to a portion of the record of State's Exhibit 102, which was previously Defendant's Exhibit Number Three, and see if that is the same document that starts on Page 16, I believe?

A Yes, it is.

Q And, again, you relied upon State's Exhibit 102 (A) is that correct?

A That's correct.

BY MR. PRICE:

We would offer State's Exhibit 102, which is the Defendant's records from Texas Rehabilitation, and State's Exhibit 102 (A), which is the record relied upon on this record.

BY MR. SMITH:

102 we have the same objection as before, and as to 102 (A) we object for the reason previously stated, and stand on Ezelle vs. Smith, Your Honor.

BY THE COURT:

Okay. 102 (A) is admitted over the objection of the Defendant. State's [1434] Exhibit 102 is admitted over his objection on that grounds, but, with the understanding that the Defendant will have the opportunity to review each item in 102, before it is passed to the jury, to make further objections.

Q Dr. Price, I believe that you also reviewed psychological evaluation reports that were part of the record of this Defendant at the Texas Department of Criminal Justice, is that correct?

A Yes, that's correct.

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBER NINETY-FIVE (C) WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q I am going to show you what has been marked as State's Exhibit Ninety-Five (C) and ask you are those the documents that you relied upon that were part of the Defendant's record at the Texas Department of Corrections or Texas Department of Criminal Justice?

A Yes, they are.

Q Okay.

BY MR. PRICE:

Judge, since State's Exhibit Number [1435] Ninety-Five, Ninety-Five (A) and (B), which represents the records of this Defendant at TDC, are quite voluminous and might take us a little time. I am not going to make an offer at this time, and we will wait until a break, maybe and we can both look at these documents to be sure they are part of the other exhibit.

BY THE COURT:

Are you going to offer Ninety-Five (C)?

BY MR. PRICE:

Yes, I will offer Ninety-Five (C) at this time, being the records relied upon by the Doctor.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

Your Honor, I do object to Exhibit Ninety-Five (C) on the grounds that we just stated, Ezelle vs. Smith grounds, and I called Mr. Price's attention to one specific line in which he has agreed [1436] should be retracted out in the appropriate way.

BY THE COURT:

They can't read it from here. That has been – what part are ya'll agreeing you want to take out?

BY MR. PRICE:

I don't mind taking out the part about death row for capital murder. I think we are entitled to get it in.

BY MR. SMITH:

I don't think it should be in at all.

BY THE COURT:

Ya'll are both –

BY MR. SMITH:

I am going to object to the whole document, but, if it is admitted, it should be retracted out.

BY MR. PRICE:

I have no problem with that, just go ahead and mark it out.

BY THE COURT:

If you would do it, black it out right now.

[1437] BY MR. SMITH:

I don't object to your taking the pen –

BY MR. PRICE:

Where it says "Death row for capital murder."

BY THE COURT:

I will just do that. (The Court blacking out the objectionable part of the record.)

BY MR. SMITH:

Before that goes to the jury, just make a zerox of it. Leave it this way, zerox it before it goes to the jury. I will hold it up to the light.

BY THE COURT:

Ninety-Five (C) is admitted over the Defendant's objection. Is that all these exhibits?

BY MR. PRICE:

Yes, Sir. I proved them all up.

(END OF CONVERSATION HELD AT THE BENCH.)

BY THE COURT:

Lets recess about ten minutes and start back – fifteen minutes, start at [1438] fifteen until eleven. That's about eleven minutes.

REPORTER'S NOTE: (WHEREUPON A FIFTEEN MINUTE RECESS WAS HELD.)

BY THE COURT:

Are you all ready? Bring the jury in.

(JURY IN)

BY THE COURT:

You can proceed with your cross examination of Dr. Price, Mr. Price.

BY MR. PRICE:

Thank you, Your Honor.

Q I promise you and the jury that this is the last time I am going to talk about these records, to speak of, but this stack of records here are the ones that were given to you, right?

A Yes, that's correct.

Q And, these represent the records that we contend are his mental health records?

A Yes, that's correct.

Q Dr, Price, I had one document here that during the break, from TDC, that I wanted to show you. One of the documents that have previously been admitted into evidence as State's Exhibit Number [1439] Ninety-Five (C), the second document there, I want to show you a document in State's Exhibit Number Ninety-Five (B). Is that the same document, Doctor?

A Yes. It has four pages. That's it.

Q Okay. Same document?

A Right, that's correct.

Q Okay. And, you got the test copies still there in your file, do you not?

A Yes, I was pulling those right now.

Q Okay. We will get to those at the break. No problem. Doctor, I believe, that you said that you saw the Defendant the first time on April 20th, is that correct?

A On April 20th, correct.

Q That is this year, correct?

A That is 1990.

Q When were you first contacted by the Defense?

A It was sometime early in April, I believe around the ninth or tenth.

Q On April 20th, you met with this Defendant, and I believe you indicated earlier that you took a background history off of him?

A It was a clinical interview where I asked questions about his present condition and past health, [1440] possibility of accidents that sort of thing.

Q Did you take a criminal history from him?

A No, I did not.

Q Didn't go into any of his background asfaras anything, – any of his background asfaras any prior acts of violence?

A No.

Q Specifically, did you go into with him, the circumstances of the murder of Pamela Carpenter?

A I didn't ask about that, no.

Q Okay. Did you ask him about the rape of Diane Koch?

A I didn't ask about that, no.

Q You didn't ask him about any kind of a prior criminal record or criminal offense, is that correct?

A That's correct.

Q How long did you visit with him on April 20th?

A It was approximately three hours.

Q What did you talk to him about for three hours, just generally speaking?

A School, experiences, what kind of jobs he had had, prison, and what he was doing there in terms of education opportunities, past experiences which asfaras he could remember, concerning [1441] health; what he understood to be in terms of questions that I asked him, about his past, when it came to medical and educational history.

Q In this three hour interview with him, did you detect any type of what you might consider mental illness?

A Well, mental illness, I did detect and thought there was a possibility of the fact that he is mentall retarded, which is a mental disorder.

Q My specific question deals with mental illness. There is a difference between mental illness and mental retardation, isn't there?

A Yes, there is.

Q Did you detect any type of mental illness?

A In the psychiatric mental disorder, other than retardation, no.

Q No, psychosis?

A No, psychosis.

Q He was in touch with reality?

A Yes.

Q He knew what was going on there?

A Seemed to, Yes, Sir.

Q And, then, on May 8th, is I believe is when you gave him this Halstead Neuro-Psychological Battery, is that correct?

[1442] A Yes

Q That was about four hours on that date?

A Yes.

Q What that primarily taken up with testing?

A Yes.

Q You didn't take up any additional information?

A No additional history or interview, no.

Q Then, on June 13th, is that when you performed the IQ test?

A IQ testing, Yes, Sir.

Q How long did you spend with him on June 3rd?

A Approximately three hours.

Q Was that totally taken up with the IQ test?

A Asfaras I can remember. I think I repeated one of the test, or I gave one test out of Halstead on that date, the trial making test, but, other than that, that time period was taken up with testing.

Q What type of test out of Halstead?

A The trial (A) and (B). It was part of the battery that I didn't complete on the 8th.

Q Okay. And, that was the total of what, about ten hours altogether that you were with him?

Yeah, approximately ten and eleven hours.

You indicated that you didn't detect any mental illness in him on the 20th of April. Would the [1443] same be true for May 8th and June 13th?

A That's correct. In terms of psychosis and that type of thing, no.

Q Is there some other kind of mental illness that you detected?

BY MR. SMITH:

May we approach, Your Honor?

BY THE COURT:

Yes, Sir.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH.

Your Honor, I object to the District Attorney's attempt to prove mental illness and make it sound like a mitigating or aggrevating factor, is not an issue here, and I object on the Fifth, Sixth, Eighth, Fourteenth Amendments of the U.S. Constitution and the Texas Code of Criminal Procedure.

BY THE COURT:

Objection is overruled.

(END OF CONVERSATION HELD AT THE BENCH.)

[1444] Q There is a difference between mental illness and mental retardation isn't there, Dr. Price?

A Mental retardation is a mental disorder.

Q Yes, Sir.

A And, the term mental illness, generally it is more of a lay term that applies to psychosis, or a case of depression, sometimes, but, usually, they refer to that when it is a psychosis, so, it is a mental disorder, is a technical term there is a – difference, but, a mental retardation is a mental disorder.

Q Aside – maybe we can approach it this way. Aside from what you feel like there may be as faras any mental retardation did you detect any other type of mental disorder in the Defendant?

A Aside from the mental retardation and organic brain disfunction, no, I did not detect any other type of mental disorder.

Q Okay. No psychosis, no schizophrenia or nothing of that nature?

BY MR. SMITH:

May we have a continuing objection?

BY THE COURT:

Objection is overruled.

BY MR. SMITH:

Can we have an exception on that [1445] ruling?

BY THE COURT:

Yes, Sir.

A That's correct. I did not detect the psychosis or schizophrenia.

Q I believe you indicated that he was cooperative asfaras when you administered the Halstead Neuro Psychological Battery, is that correct?

A Yes, that was my opinion.

Q Was he also cooperative when you administered the IQ test?

A Yes, Sir.

Q Was he cooperative when you interviewed him and got this background history from him?

A Yes. I had to establish some – the first time I saw him, but, he was cooperative.

Q I am going to ask you a little bit about the Halstead Test that was administered on – I guess it was administered on, primarily on May 8th, one part of it was given on June 13th?

A That's correct.

Q The puzzle that you showed the jury yesterday. On that particular test, did I understand you to say that the first time that you administered it, it took him eleven minutes to complete that puzzle?

[1446] A Yes, that's correct, actually 11.2.

Q 11.2 minutes?

A Right.

Q And, the second time that he did it, how long did it take him?

A It took fourteen minutes.

Q I thought you said it took fourteen and a half. Was it fourteen or –

A It was fourteen and two seconds, so, fourteen is accurate.

Q Okay. And, the third time was how long?

A The third time administered the test, was four minutes.

Q Okay. So, he went to eleven minutes the first time, took him three minutes longer to do it the second time, and then, he reduced it all way down to the four minutes on the third time, is that correct?

A That's correct.

Q Did that indicate to you any kind of a malingering or faking?

A No.

Q None at all?

A No.

Q Okay. This test, this Halstead Test that you administered, isn't it correct that some of [1447] the assessment of that test is up to the examiner, that you have to apply a subject decision as to certain aspects of that test?

A Interpretation?

Q Yes.

A Is up to the examiner.

Q Okay. And, for example, on this particular test, lets just take this total situation as demonstrated to the

jury. You were the one that decided ultimately that Number One that he wasn't faking and Number Two, that this indicated mental retardation to you, is that correct?

A That was an indication of organic brain impairment, yes.

Q When you say, organic brain impairment, are you talking about an organic brain damage, is that what you are saying?

A Yes, we talked about impairment as a term, if there is no known cause that we can point to exactly, that we know for sure caused it like in [1448] the case of a head trauma, we say impairment, in that it is a problem in functioning, that is what we can be sure of, if there is no known exact and specificy ideology, or cause.

Q Did I understand your testimony yesterday, that the test is ninety to ninety-five percent accurate?

A As the overall battery and a discrimination between those were non-impaired brain and impaired brain, that the accuracy is over ninety percent.

Q That is assuming that there is no faking?

A Assuming that.

Q Are you telling the jury in your opinion that there is physical brain damage, this Defendant suffers from physical brain damage?

A Yes, and that he had brain impairment from some cause of brain damage, Yes, Sir.

Q You understand what I am talking about, when I say physical damage to the brain?

A Yes, I think I do.

Q As opposed to just being someone that is born and that their brain does not function as well as somebody elses brain, but, you are talking about an actual damage to the brain, are you not?

[1449] A Yes, although that the damage could have a prenatal origin that would be born with it, that way.

Q For example, an injury to the mother maybe while she was carrying the child?

A That's correct.

Q I believe you gave an example also, of alcohol?

A That would be another possibility, yes.

Q The fifteen item test that you held up and showed the jury yesterday, is that the sensory perception part of the Halstead Test?

A No, it is not.

Q What part is that called, or is that part of

A Halstead Test?

A No, it is part of a Halstead Battery.

Q What was it, what was the purpose of it?

A The purpose of it is to, as I explained, to give the person an opportunity to fake, and it is a way to detect if they are trying to do poorly, but, it is an important part of the Halstead-Raycon Battery. It is an additional technique for that purpose.

Q And, you performed that by showing him this piece of paper that you showed the jury yesterday, [1450]

which has fifteen items on it, and you allow him to look at it for ten seconds, and what did you require him to do?

A Draw as many of them on.a piece of paper.

Q On a piece of paper?

A Yes.

Q As I remember, he got twelve out of the fifteen, after looking at this for ten seconds, is that right?

A That's correct.

Q Would that indicate to you at least his memory was in tact?

A Grossly so, Yes, Sir.

Q Did he follow his instruction that you gave to him to taking these tests?

A Yes.

Q He was able to control himself, around you, was he not, Doctor?

A Seemed to be, Yes, Sir.

Q He didn't attack you or anything like that, did he?

A No, Sir.

Q Or attack anybody else around during your presence?

A No, Sir.

[1451] Q Did he act inappropriately asfaras any kind of

A violence or,anything of that nature?

A No, Sir.

Q Did he exhibit to you an understanding of the difference between right and wrong as the average person?

BY MR. SMITH:

Objection, Your Honor. On the grounds previously stated.

BY THE COURT:

Overrule the objection.

A I didn't ask him if he knew the difference between right and wrong.

Q Well, you talked to him for eleven hours, though, Doctor, You kind of arrived at an opinion about whether or not he had an understanding between right and wrong, didn't you?

BY MR. SMITH:

Your Honor, can we have a running exception, Your Honor?

BY THE COURT:

Objection is overruled. Yes, Sir.

Q Weren't you able to conclude that he did know the difference between right and wrong?

A I would say so, Yes.

[1452] Q Okay. And in any kind of psychological test, being an expert in the field as you are, you recognize

obviously, the possibility of faking or as it is referred to in your profession, I believe, malingering, is that correct?

A Yes, that's correct.

Q You recognize the possibility of that being in existence, in this case, do you not?

A Yes.

Q At the time you examined him and gave him these psychological test, both the Halstead Battery and the IQ test, was this Defendant charged with capital murder?

A Yes.

Q His trial was eminent, was it not?

A Yes, Sir.

Q He was facing the possibility of a death penalty was he not?

A Yes, Sir.

Q He was well aware of all of that, was he not?

A Yes, Sir.

Q Do you think that would almost have to have some effect on his taking these tests under those circumstances?

A I think it is a distinct possibility, certainly, [1453] it would seem to me to be so.

Q Can you think of a much stronger reason to malinger than to be confronted with the death penalty?

A Not for most people.

Q And, isn't it true, and I believe didn't you quote the DSM-3 yesterday in some of your testimony?

A Yes.

Q You know what that is don't you?

A Yes.

Q What is it, tell the jury.

A It is the diagnostic and statistical manaul of the American Psychiatric Association, the third edition that is what the three is, DSM-3 that is what it stands for. The manual to be used by psychologists and psychiatrist who diagnose mental disorders.

Q And, they have a section in that book, dealing with malingering, do they not?

A Yes, Sir.

Q Are you familiar with that?

A Very much so.

Q At the time that you examined Mr. Penry, had you been referred or had he been referred to you by an attorney?

[1454]A Yes, he had.

Q And, he had pending criminal charges against him, did he not?

A Yes.

Q In fact, the most serious one under Texas law, capital murder, is that correct?

A Yes, Sir.

Q And, I believe you indicated in your testimony yesterday, that there was definitely the presence of anti-social personality traits, were there not?

A Yes, Sir.

Q Does not DSM-3 state as follows: "That malingering should be strongly suspected if any combination of the following is noted," and two of those items are, "One, medical/legal context presentation, for example, the person being referred by his or her attorney," and another one, "The presence of anti-social personality disorder?"

A Those are two of the four, Yes.

Q And, the manual says, that any combination of those four, and that would be a combination would it not?

A Yes, Sir.

[1455] Q "Any combination, then, malingering should be strongly suspected," should it not?

A That's correct.

Q Okay. Common sense kind of tells you that, too, wouldn't it?

A I think so.

Q Don't have to be a psychologist or a lawyer or anything else to figure out somebody facing the death penalty, got a pretty good motive for malingering?

A I think so.

Q Did you ever see Dr. Dickerson's report on this matter?

BY MR. SMITH:

Objection, Your Honor.

BY THE COURT:

What is your objection?

BY MR. SMITH:

Approach?

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

I'm not sure where Mr. Price is going with this. We may well have an [1456] Oklahoma problem. I don't think he has any right to bring out that we may have had other experts do other reports.

BY MR. PRICE:

I want to ask, him, had he seen the report. If he has seen the report, then, I intend to ask him about it. If he hadn't seen it, then, I can't ask him about it, if he agrees with it or not.

BY MR. SMITH:

I don't think he should be mentioning the names of those doctors that have examined this man, in the presence of the jury, and ask him what he saw.

BY THE COURT:

Your objection is overruled.

(END OF CONVERSATION HELD AT THE BENCH.)

Q Did you see a report from Dr. Wendell Dickerson a psychologist for the Defense, concerning this Defendant?

A No, Sir.

Q Excuse me. It was Dr. Wendell Dickerson.

A No, I did not.

Q You know who I am talking about?

A I know him, Yes, Sir.

[1457] Q You all worked together some on this case, haven't you?

BY MR. SMITH:

Renew the objection, Your Honor.

BY THE COURT:

Overrule the objection.

Q Haven't you?

A Yes, we have. I talked to him.

Q Okay. But, you never did see his report?

A No.

Q He didn't furnish you with a copy of it?

A I have not seen it.

Q Okay. In addition to malingering, that is something that you obviously would want to take into account in any situation such as this, would you not?

A Any situation where the person is in contact with the legal system, and stands to benefit, I know that it should be suspected.

Q That is a strong motivation to malinger, is it not?

A For some people, very strong.

Q In addition to that, anti-social personality, in and of itself, can be indigitive malingering also, can it now?

[1458] BY MR. SMITH:

I object to it, Your Honor, it is repetitious. He has asked the same question about four times.

BY THE COURT:

The objection is sustained. I think you already asked that question. Lets move on.

Q When you were talking to this jury, yesterday, on direct examination, you were talking about the effectiveness of IQ test in particular, but, I think some of this, would apply also to any kind of a psychological test, probably with respect to maybe the first – there was a built in error of some five or six points, is that correct?

A That's correct.

Q Is it five or is it six?

A Well, how accurate did you want to be? Some people that just want to be sixty-eight percent accurate, say three or four points, and the ninety percent experts say it is five points.

Q Where does the six come in?

A Well, again, that is the standard error on the verbal section is four, on the performance it is [1459] six, and to make things easier to interpret; the DSM-3 says, take a plus or minus five. So, I would generally use five as the constant interval for the ninety percent.

Q That is kind of up to the examiner again, you pick whether it is five or six?

A As to how accurate you want to be, Mr. Price.

Q Okay. You want to be more accurate, you pick six?

A Well, no.

Q Less accurate?

A Yes, if you pick three, it wouldn't be as accurate, you would be probably sixty-eight percent accurate if you pick three.

Q You mentioned another thing that can effect IQ test and I would also ask did that effect the Halstead Test also, error on the part of the examiner?

A Yes, that's correct.

Q That is something that could effect any test is that correct?

A Any test has to be properly administered, scored and interpreted. That part of it is up to the examiner and their experience with them.

Q Okay. You also mentioned that the person that [1460] is being tested could have an effect because they may have a good or a bad day?

A Right. In terms of especially when it comes to mental ability.

Q All of us have good and bad days, don't we?

A Yes, Sir.

Q My day is not very good after sitting here all day yesterday, and I am sure yours is not, either, and incidently, you said another thing that can effect a person's IQ test, is a person can improve. In other words, on the verbal aspect, is that correct?

A That's correct, especially on the verbal IQ, since it is more influenced by educational experience, that is subject to improvement.

Q Of course, you did mention faking or malingering is something that could effect any of your tests, and that is true, is it not?

A Yes, that is true.

Q Could a person taking these kinds of test, aside from the malingering, but, just the mental effect, be effected by the fact that they were facing capital murder charges, facing the possibility of a death sentence, on their mental status, could that effect them?

[1461] A In terms of interference of anxiety with their mental ability?

Q Stress.

A I think that is a possibility, and one of the reasons to establish some degree of – and comfort with the individual, try to minimize that.

Q That would be another factor that could affect the outcome, could it not?

A Some people, it could be a very important factor.

Q One thing that I don't believe you mentioned also, about this, about factors that could effect them, is the bias of a person giving tests, in other words, you?

A Well, that would come in under the possibility of an error by the examiner, if there was bias there.

Q Well, there is another possibility there besides error also, is where you hired by the Defense to do a specific thing, and such as here, to make the examination, you were hired to go out there and examine him, obviously, you knew that it would be to their benefit if he tested out mentally retarded or if he tested out brain damaged, you [1462] knew that going into it, didn't you?

A Yes.

Q What I am talking about here, is not an error on the part of the testor, but, I am talking about a bias in these close areas, where you have to make a judgment call, and it is a close area, you as the testor, can call it left or right, because it is close, and don't you think that is a factor also, that should be considred a possibility, that you are bias because of the circumstances around you testing this individual?

A It should be considered. I call them like it is. If they didn't want to call me, to Court they didn't have to.

Q I'm not, Doctor, accusing you of intentionally doing anything. I am just asking, human nature being what it is, you have already said that some parts of these

tests are left up to your objective judgment call, isn't that correct?

A Some parts of the interpretation, yes.

Q Right. And, wouldn't it be fair to this jury to say that under the circumstances, the way you were hired in this case to go out there and perform these tests, right before a capital murder trial, that, that bias might effect your [1463] judgment a little bit?

A I don't think that would be fair, no.

Q You don't think that would be fair. Okay. That would be up to the jury to decide that?

A That's correct.

Q Another thing that might effect a test is a person being on drugs?

A That's correct.

Q You know what kind of drugs that he was on on the dates that you examined him?

A I would have to check the record. It wasn't anything anti-psychologic, such as major tranquilizers and that would be the main drug that I would be concerned with. And, it is a historic thing.

Q Look in your records there and tell me what kind of drugs that he was on at the time.

A I am trying to think of where that would be. I don't know that I have a notation on that. I'm trying to remember. I think the only thing that I can remember is that it was either antihistamine or something similar to that, but, it wasn't a major tranquilizer that I remember.

Q Antihistamine is something that you take for [1464] a runny nose or something like that?

A Or swelling sometimes.

Q But, you are not aware of any of the drugs that he was on other than antihistamine?

A Well, I know that it wasn't a major tranquilizer and that was what I was concerned about.

Q Okay. Triavil, Elavil, any of those be major tranquilizers?

A That is anti-depressant.

Q Could that effect it?

A They have been shown to effect it. They have not been shown to effect the performance on the neruo-psychological battery significantly. Actually, sometimes they can improve performance because like you were talking about earlier in terms of interference of anxiety, there is also an interference of slowing down when somebody is depressed. So, some of the studies on anti-depression shows it increases their performance because it is not a slow-down.

Q What about a drug that did slow them down, make them sleep?

A Well, it might effect it. The studies indicate the concern is about the major trnaquilizers.

Q In May of this year, I believe, is that when [1465] you took this test?

A. Yes, that's correct.

Q Okay. Would it surprise you that sometime during that month, he was interviewed by Dr. Quijano and during that time, he kept complaining of being sleepy because of drugs that he had taken?

BY MR. SMITH:

Objection, Your Honor, reciting facts that are not in evidence.

BY THE COURT:

Sustain the objection.

Q Did you really check to see what kind of drugs he was on, in all honesty Dr. Price?

A Yes, I asked about the major tranquilizers.

Q Who did you ask?

A I'm trying to think if it was in the record or I talked to Mr. Brewer in the clinic. I remember asking and inquiring about major tranquilizers, that's all I was checking for.

Q When you say in the records, what records are you talking about?

A Well, I don't remember now, I don't remember. I don't have the records.

Q Some of those records that you gave Dr. Mount?

A I don't know. I don't remember.

[1466] Q These TDC records, I guess, is that what you are talking about?

A Either that or it was a psychological evaluation from TDC.

Q That would have the drugs in it?

A Yes.

Q Current?

A Sometimes they would, but, if they were just taken for the short term.

Q Well, I haven't seen the TDC records that you showed us and that has been introduced into evidence, here, doesn't have anything in it, about what kind of drugs that he was on, does it, Doctor?

A I don't recall any.

Q You don't recall anything about drugs now, is that what it is?

A He wasn't taking a major tranquilizer, that's all I know.

Q You just know that he wasn't taking a major tranquilizer?

A That's correct.

Q When you interviewed him there for several hours did you talk about his history of drug abuse?

[1467] BY MR. SMITH:

Objection, Your Honor.

BY THE COURT:

Overrule the objection.

A No.

Q You didn't?

A No.

Q You didn't feel that was important?

A It could have been a possibility, for a cause of the brain dysfunction, but, actually, the studies indicate contrary to what most people think, that, primarily drugs that cause brain dysfunction, but, other than that, the other ones are equivocal in terms of what they do over a long term to a person's brain.

Q There was a lot of drugs that could have affected a person's capability on the Halstead Test, are there not Doctor?

A If they are taking them currently?

Q Yes, if they were taking them at the time they they were tested?

A Certainly if they were using drugs at the time they were tested, that would be a possibility.

Q Okay. And, no matter whether it was prescribed drugs, or not, you are aware, or you not that [1468] inmates even in the Texas Department of Corrections can get their hands on illegal drugs, are you not?

BY MR. SMITH

Objection, speculation and prejudicial.

BY THE COURT:

Sustain the objection. Disregard the question.

Q Another factor that you didn't mention when you were talking about things that could effect the validity of the tests, is motivation?

A Well, the part about good days and bad days, that also, includes the motivational factors as well as some fluctuation in the person's civility, with regard to fatigue and such as that.

Q That would also be important not only with respect to the test that you gave, but with respect to the test that you relied on out of his past, too, is it not?

A On that particular date, or when he was examined, that could be an important factor, and how hard he tried, that would be a factor that would put a fluctuation and variation in the scores.

[1469] Q For example, an IQ test is based on the assumption that the person being tested is absolutely trying to do their best, is it not, in order to be accurate?

A Well, the IQ test, is based on the assumption that it is their typical performance and that the examiner is suppose to attempt to get as much effort an cooperation on it. When it comes to neuro-psychological test battery, there is more of an emphasis on the person's maximum performance, and sometimes will even go beyond the standard procedures and test the limits, its called. On the IQ test more standardized and the terms of assuming the typical performance without undue low effort and cooperation.

Q I am not sure I understood that.

A It is the assumption, typical rather than maximum on the IQ test.

Q It doesn't measure his maximum intellectual ability?

A That's the point, it doesn't – it meausres a part of intelligence, and that in terms of capacity and what would be possible had the conditions been different, there is nothing that can measure that.

[1470] Q What you are saying, that if it didn't measure typical, does not measure his maximum, then, he could be smarter than what those IQ tests, show then, in effect?

A There is error in the measurement, that's correct.

Q Okay. Anti-social personality is very important with respect to motivation and taking that into consideration is it not?

A I'm not sure I understand the question.

Q A person with an anti-social personality may just simply not care about taking the IQ test they may not care about what their test results are?

A You have to look at the answers in testing them yes.

Q And, not be motivated, in other words?

A I found that experience with them, yes, sir.

Q Another thing involving motivation, I believe we have already talked about it, is the legal problem that a person may be confronted with, particularly the death penalty, that could be a motivational factor also?

A For some, very strong. Others, they may not care about it.

[1471] Q Some, they just don't care if they get the death penalty or not?

A I am sure that there are some.

Q Are there?

A I read about some of the news of – but, I have never examined one that it didn't seem to matter.

Q Okay. It did matter to Mr. Penry, though, didn't it?

A I think so.

Q So, that could be a factor affecting him also, could it not?

A Could be, Yes, Sir.

Q Common sense tells you that, wouldn't it?

A Yes, Sir.

Q Since you, as a testor, has to make these subjective decisions sometimes, and you have to interpret some of these results, in other words, this test is not something that you just stick Johnny Penry's finger into a machine and it spits out a number on the other side that he is brain damaged, or he is not, or he is retarded or he is not, you actually have to apply an interpretation, you have to interpret the test, and do you feel that it would be important to know as much about the Defendant and his background [1472] as possible, wouldn't that assist you in interpreting these tests?

A The more you know about things that are factors that have been shown relevant to brain dysfunction, I think the better off you are in interpreting.

Q I'm not talking about a matter that just pertains to brain dysfunction, I am talking about matters about his

history, about his life, because the type of person he is, because that is what we are talking about, and you ultimately reached that conclusion that he is mentally retarded, brain damaged, or whatever you are talking about, the type of person and wouldn't it help you to know as much about his past as possible, his past history?

A Well, yes, I think as much about the factor is relevant, and there are some that advocate including a procedure from Dr. Raycon, advocate a blind analysis, first, take a look at the data and see what you think without knowing anything about the person and then, finding out about things that are important, such as educational experience, accidents, that sort of thing, and then, to interpret it in light of that, but, to first do a blind analysis.

[1473] Q And, that is what you did, a blind analysis?

A I didn't do that, no.

Q You did a semi-blind analysis?

A I suppose you could call it that.

Q You looked at part of the record, you took a social history off of him, but, you didn't take a criminal history off of him, is that correct?

A That's correct.

Q So, you did a semi-blind analysis and a semi-unbiinded analysis, is that correct? What would be a wide analysis?

A It was an analysis of the results with information that I thought was important to the interpretation.

Q Who decided what was important out of those records?

A I asked for psychological and psychiatric evaluation and I decided what was important out of those for my interpretation.

Q What you are saying is that they sent you a lot more records than that, and you went through them and picked out these, or did they just send you these?

A I think I asked one of the assistants to take out the psychological evaluation because that is all I wanted to look at, as opposed to all [1474] of the other things that have been introduced into evidence.

Q They sent you all of it, or the assistant picked out these is what it was?

A There was a box of records that were sent, which I assume is the box that Dr. Mount obtained from my office, and I took and - I asked them to separate out psychological evaluations especially those scores that was all I cared about seeing, as it pertains to the interpretation of my findings.

Q What happened to that box of records?

A I don't know.

Q How did Dr. Mount get by without those records, without those psychological evaluations?

A Well, he came to my office to pick them up, which would - and there was some articles that he had to see,

and I had them all there and I suppose that is why he got them. I reviewed the psychological evaluation, especially those with scores, that is what I relied upon.

Q You removed those from the records, before Dr. Mount -

A I did not remove them. There was one of the assistants from the case of counsel took them.

[1475] Q So, Dr. Mount's set of records, that didn't have the psychological reports in them, and you had the psychological reports and didn't, have the rest of the records, is that what it amounts to?

A I don't know that.

Q Okay. Isn't it true, Doctor, that good test results, any type of test, results of the test should be consistent with what is really going on in the real world? Is that a fair assessment? In order for it to be an accurate test?

A I guess so. I'm not sure I understand your question, but, if it is, it is not something that has been shown to be valid, I wouldn't consider there being any reason to give the test.

Q The test wouldn't mean anything, really, Doctor, if it didn't represent txue conditions of the person that you are testing, would it?

A Weii, that's true, yes.

Q But, you didn't have all of the facts to compare it with, did you? You don't know whether the test that you administered represents Johnny Penry in reality or not, do you?

A Based on my review and my experience, I think [1476] it represents his brain function.

Q But, it is based on your review of a limited amount of records, and based on your review of a limited social history of Johnny Penry, isn't that correct?

A On a review of those things that I considered, I only reviewed those things that I considered important in my opinion.

Q You didn't consider the criminal history or history of violence, you didn't consider any of that important?

A For the purpose of my evaluation, they may be important for other purposes, but, they weren't for my evaluation.

Q These tests, I guess, what I am really getting at, Doctor, these tests can be somewhat misleading, just the test themselves? For example, if they want to use the example, of if there was really a Tarzan portrayed on TV, and you took that man out of the jungle and gave him this Halstead Test, or gave him an IQ test, he is liable to score down in the mental retardation area, may he not?

A There is a lot of things that would qualify about an answer to testing Tarzan, I think.

[1477] Q What I am saying, you take a person out that has not been exposed to society, social and culturally as others, that would effect an IQ test, would it not?

A Especially the verbal part, yes, that's correct.

Q That's right. You have stated previously, that the anti-social personality is an important factor in considering, is it not, in making the assessment of the individual's mental status, as you have in this case?

A It is important. The presence or absence of that, for the purposes of conducting intellectual and neuropsychological test it was not important for the focus in my evaluation.

Q I think I have got this right. I got it from the court reporter this morning, but, in answer to a question, yesterday, you said, about anti-social behavior and background, it would be important in explaining and understanding the whole person?

A That's correct.

Q Don't you think that going into a person's criminal background and criminal history, specifically the matters that he is charged with this case, would be important with respect to the [1478] anti-social personality and the whole person, as you say?

A It is important to the jury to make their decision?

Q No, important to you for you to make those types of interpretation that those subjective judgment calls, that you got to make in giving those tests?

A Only in terms of suspecting, like we discussed earlier; the presence of faking. Other than that, I don't have any problems with giving the intellectual and mental psychological test without having a complete criminal history. I am not saying it is unimportant. I think it is very important to these proceedings, but, for the focus of

my evaluation, that was not critical for my evaluation of his intelligence and brain function.

Q When you are coming here and telling this jury, and telling this jury in your opinion what his mental status is, and that is what you have done, you have come in here and told them that he is mentally retarded and has got brain damage. That is the whole person, isn't it, isn't that what you are talking about?

A No. I'm talking about those aspects of this person.

[1479] Q Well, I am going to eliminate the physical aspect any kind of a physical handicap, and things of that nature but, in your field, the mental science field, you are talking about the whole person when you come in here and give this jury your opinion, about his mental status are you not?

A Well, the whole person includes things about their moral character, their physical status like you said, everything about them. I'm talking about a brain functioning, and that was the focus of my evaluation.

Q Right. An anti-social personality, is important when you are talking about a brain functioning, is it not?

A Not for the purposes of this evaluation. I didn't take a criminal history and it was for that reason, I don't know how else I can say it.

Q Well, for example, if you had looked at his mental history and you had seen where he was cutting, where he had the ability to reason, where he had the ability to plan, pre-meditate and things of this nature, criminal events and [1480] acts in a loaical sense, at least from a criminal

standpoint, don't you think that would be important to you?

A It would be important, but, it wouldn't change my interpretation of the testing that I gave.

Q If you gave him a test, and it showed mental retardation, low IQ, whatever, but, on the other hand you got a history of this man that shows that he has got a higher IQ than that, that he is capable of functioning much higher than that, wouldn't tht tell you something about your test?

A Well, it would be comparing apples and oranges, that's why I asked for things in the record, that I would compare to, and that was other scores other objective evaluations. I think that information that you are talking about would be important for the jury to consider.

Q But, you didn't intentionally, by chance, avoid going into the criminal history in this matter, did you, or did you?

A I wouldn't have done that, if I was doing this type of evaluation, for any other proceeding, because of what my evaluation is focused on.

Q You would not go into the criminal history?

[1481] A If I was wanting to determine whether a person was mentally retarded, and if that was a symptom of organic brain dysfunction, that would not be a factor that I would have to make, that interpretation.

Q But, it might tell you something about the malinger or faking on the test, if you knew his criminal history, and you knew, based on that criminal history, he could

perform at a higher intellectual level than what the test was showing that might show that he was faking, wouldn't it, Doctor?

A It was enough to know that he was incarcerated and facing trial for capital murder, has the possibility of – and involving capital punishment, that was enough for me to be suspect of faking.

Q But, not enough to use – serious enough to check him out enough to go ahead and find out about his background in great detail, and therefore you would have the facts available to you to make that decision, it wasn't that important to you, was it?

A I don't guess so. I didn't take a criminal history.

[1482] Q And, you are saying that you normally would not take a criminal history?

A I wouldn't if the focus was entirely on the determination of mental retardation and intellectual impairment.

Q Okay.

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBER 103, WAS MARKED FOR IDENTIFICATION BY THE REPORTER, BEING THE AFFIDAVIT OF DR. RANDALL PRICE.)

Q I show you what has been marked as State's Exhibit Numbers 103. Can you identify that document?

A Yes. This is an affidavit signed by myself on April 14th, and attached report on another case that was a neuro-psychological evaluation.

Q Isn't that exactly what you did on Johnny Paul Penry, a neuro-psychological evaluation?

A And, an intellectual evaluation.

Q This was a different person, was it not, in this report?

A Yes, Sir.

Q And, in this report, you did take a criminal [1483] background did you not?

A Not a complete criminal history, no. It was enough to find out that he had a criminal background, which I knew about Johnny Penny. I didn't take a complete criminal history, on this individual.

Q. You took a substance abuse background on that individual, did you not?

A In that case, the question involved the potential brain dysfunction from a particular drug or probable drug abuse.

Q That was the only reason that was in this report, because that involved drugs?

A It was a possibility of brain dysfunction in that case.

Q What was the purpose of that examination?

A To determine if the presence was there of mental retardation and/or organic brain impairment.

Q Were you given those instructions by someone?

A Yeah, that was the purpose, than is what I was asked to do by Defense Counsel.

Q Okay. Limited to those two points?

A That is what my – that was my purpose in doing the evaluation.

[1484] Q You were not asked to give him a general examination concerning his present mental status generally speaking?

A Well, that I did in determining what test to give and the clinical interview, if you want to call that a general mental status, but, the purpose for the evaluation was to determine if mental retardation and/or organic brain impairment was there and if it was there to what extent and that is what I did.

Q That was the instruction that you were given by Defense Counsel?

A That's correct.

Q Based on your examination and those records that were furnished to you, as well as those others that you gave Dr. Mount, if you saw any of them, and based on all of your training, and experience and all of your qualifications, that you told the jury about yesterday, in your opinion, Doctor, is Johnny Paul Penry a dangerous individual?

BY MR. SMITH:

Objection, your Honor.

BY THE COURT:

What is your objection?

[1485] BY MR. SMITH:

No basis for asking this witness about that, that is not the subject of his testimony.

BY THE COURT:

Overrule the objection.

A If he was in the free world, I would consider him dangerous.

Q Okay. And, that is based on what you saw without even going into his criminal background, is that correct?

A Really not even something – that is a common sense logical opinion that anybody might arrive at in the case without any scientific under-planning to it. You asked, if I had an opinion, that would be my opinion in the free world.

Q He is dangerous?

A Right, but, I wouldn't support that for a scientific opinion by any means,

Q Just quit being a scientist?

A Well, I think that you don't have to be, if you are a scientist, that you don't have to also be illogical and I wouldn't be illogical.

Q I will accept your opinion as a non-scientist that he is dangerous, okay?

[1486] A Okay. Thank you.

Q And, that way – if you can answer my question without talking about it for thirty minutes, that was

without knowing the details of this man's criminal history, you still think he is dangerous?

A Without knowing all of the details, I think that in the free world, that would be my logical opinion.

Q Okay. Now, lets assume, Doctor, that this man is a rapist, he was convicted of rape sent to the penitentiary in 1977, he was released from the penitentiary in 1979, and within sixty days, raped and murdered again, and lets further assume, Doctor, that during this time on death row, he had –

BY MR. SMITH:

Objection, Your Honor. I move to strike and ask for a jury instruction.

BY THE COURT:

Disregard that part of the question. The objection is sustained.

BY MR. SMITH:

Move for mistrial, Your Honor.

BY THE COURT:

[1487] Motion for Mistrial is denied.

Q Further assume that during the time that he had been in the Texas Department of Criminal Justice, that he has been involved in several assaultive offenses, three involving him having homemade knives or shanks, as they are called in the prison system, I am sure that you are familiar with?

A Yes.

Q Do you think, Doctor, based on that, plus what you already know about him that, that would make him a dangerous individual?

BY MR. SMITH:

Objection, Your Honor, there is no showing that there is any showing that there is no scientific basis for an opinion here. This man here is an expert, he is not allowed to lay opinions on such, no scientific expertise.

BY MR. PRICE:

Hypothetical based on the evidence, Judge. He came here and offered himself as an expert.

BY MR. SMITH:

Hypothetical expert, he said there is [1488] no science –

BY THE COURT:

Objection is overruled. You can answer the question, Dr. Price.

Q Would that strengthen your opinion as to his dangerousness?

A Yes, I think so.

Q Okay. Furthermore, Doctor, isn't it also true that sex offenders, particularly rapists, have a high repeat rate, in other words, that they repeat their crime more so than criminals in other areas?

BY MR. SMITH:

Objection on the grounds that no foundation that this witness has the necessary expertise, Your Honor.

BY THE COURT:

The objection is sustained. You can question him as to that.

Q Based on the hypothetical that I gave you, the man having been convicted of rape and then committing rape, murder within a short time after he was released from prison, you think he might be a threat and might be dangerous, even in a prison environment?

[1489] BY MR. SMITH:

Same objection, Your Honor.

BY THE COURT:

Objection is overruled.

A A threat in terms of engaging in fighting in prison, which is very common, I think so.

Q What about engaging in rape in prison? Are you aware that we have female guards, females that work in the prison system, are you not?

A Yes, I am aware of that.

Q Are you aware that just within the last few hours, we had a guard that was killed by an inmate?

BY MR. SMITH:

Objection, Your Honor.

BY THE COURT:

Sustained the objection.

BY MR. SMITH:

Ask for an instruction, Your Honor.

BY THE COURT:

Disregard that question.

BY MR. SMITH:

Move for mistrial.

BY THE COURT:

[1490] Motion for Mistrial is denied.

BY MR. SMITH:

Can we have a continuing objection as to future dangerousness?

BY THE COURT;

You need to stand up and object.

BY MR. SMITH:

Okay.

Q Would he be dangerous with respect, under those hypothetical circumstances that I just gave you of him being a convicted rapist, and then a rape murder, as well as all of the information that you know about him, would you say that he would be dangerous inside the prison environment as well?

BY MR. SMITH:

Same objection, Your Honor.

BY THE COURT:

Objection overruled. You can answer the question.

A I think that my lay opinion would be that the environment which is very structured and protected, to insure everybody's safety.

Q Can you answer my question?

A You can repeat the question if you like.

[1491] Q Would he be dangerous inside the prison?

BY MR. SMITH:

Repeat the objection.

BY THE COURT:

Objection overruled.

A Not necessarily. The environment is structured enough that I think that people's safety could be protected. It is not a professional opinion.

Q You mentioned yesterday brain impairment. Is it your testimony that the term brain impairment is now substituted for taking the place of brain damage?

A You can use really either one. I think a brain impairment is more accurate as it pertains to the neuropsychological aspect.

Q People in your profession don't use the term brain damage?

A Yes, we use that at times

Q Sir?

A Yes, we do use that term.

Q Brain impairment covers a much broader area than brain damage, does it not?

A That's correct.

Q Brain impairment could be either physical damage to the brain or non-physical, an injury or not [1492] an injury, but, non-physical dysfunctioning of the brain, could it not?

A I don't know how you could have non-physical brain impaiment or dysfunction. Intelligence can be effected by non-physical aspects of the environment, but, brain functioning is something, if there is brain impairment, something wrong with the brain. I will try to put it in English.

Q Okay. Are you saying that – what is your definition of brain impairment?

A Brain is not working right.

Q Okay. That could be because one person was just not born quite as smart as another person, couldn't it, in some areas?

A Well, that would effect certain aspects of intellectual functioning, but, not all aspects and if there are certain patterns that we know that are identified with brain impairment, and certain paterns because that is the way they were born, certain patterns because they have poor educational and cultural experience.

Q So, when we talk about a brain damage, we are talking about a physical injury to the brain, are we not?

[1493] A Well that is what that term indicates, that, you know that there is something that caused a particular physical injury to the brain and in those cases, it can be shown to cause, – to have caused structural damage which would end up in functional impairment, but, there are other times when you don't know what caused it, you can't look at a brain, put it on autopsy and say, there it is, there is the structural damage to the brain. There are other times that it doesn't show up, like this, and there is still brain impairment, because there is –

Q That is exactly the point that I am talking about, a difference between brain impairment and brain damage, is it not, Doctor?

A Well, I am trying to explain that difference. There is substantially not a difference. Here is the difference. Brain damage means that you can point to a particular cause, you know what it is, had an accident, there was shock and you can point to that person's brain and say, there is where it is structurally damaged. Now, that would end up in brain impairment, but, now there is other kinds of brain impairment [1494] that we are not for sure what caused it. We don't know, and that whatever physical damage that is there cannot be detected by the medical test that are used to detect brain damage, that has a hole in the brain or a tumor or something, it takes up space, so that is the difference. It is a suttle distinction, but, –

Q For the examples that you were giving yesterday, whole? Okay. What does alcohol do, kill brain cells, is that right, excessive use?

A Excessive use will kill it. You can say kill the brain cells, actually would lead to – of the brain, if abused over a long period of time.

Q What is – ?

A That the brain starts to shrink, actually, and space in between the part of our brain that is – in that case, this is also what happens to all of us if we live long enough, that is the brain starts to shrink and that the cyntrical the spaces, inside of the brain, become larger and that will show up on medical test.

Q Is that what you were talking about, about alcohol, yesterday? You gave that as an example, with a World War II bullet, I believe, going [1495] through somebody's head?

A Well, are we talking about alcohol or are we talking about brain damage as a result of a penetrating head trauma?

Q I don't know what we are talking about. I am trying to figure out what the terms that you are using. You keep using brain impairment, then you switch back to brain damage, and I want to know exactly what you are talking about.

A I tried to explain that.

Q Okay. If for example, you mentioned yesterday if I understand, a head injury, and you gave the example of a bullet going through the brain?

A Yes.

Q Okay. That would be brain damage, would it not be?

A Yes, and brain impairment.

Q Okay. Right. It would also be – what if lets see the other examples, that you gave, was minor blows to the head that accumulated over a period of time that might cause damage to the brain. Was that another example that you gave?

[1496] A Yes, and brain impairment, in that example, would be unlikely that we could point to a particular part of the brain and say there it is, there is where the damage is. It is a generalized loss of neuro-function that could come about, from having several, actually come from having several times where the brain is bruised, but doesn't show up, you can't point to it, but, we know it is there because the functioning is impaired. Well, the brain damage is there we just don't know exactly where it is in the brain. So, then, we say brain impairment.

Q Okay. Then, we say brain impairment?

A Brain impairment is less specific as to localization of the injury, the tumor or the damage. Less specific. We usually talk about then a generalized condition.

Q Then, there is a difference, isn't there, there not necessarily – with one another is what my whole point is?

A Well –

Q Brain damage?

A If they were synonymous, I don't think that we would have two terms. They are not synonymous.

Q Now, I want to know what your diagnosis is. Are [1497] you saying that he is brain damaged?

A Yes, I will say brain damaged, Yes, Sir.

Q There is some physical injury to the brain?

A I am assuming from the brain impairment, there is, but, a generalized,is going to involve several areas of the brain, and I can't tell you exactly what caused it or exactly where the damage is, because it is not a focal injury, it is a diffused loss of integrity of the brain.

Q How do you know that?

A From the test results.

Q Okay. What test results?

A The Halstead-Raycon neuro-psychological test battery.

Q That is the only test result that you rely on in that area.

A That is what I relied on in arriving at that conclusion.

Q Okay. Aren't there tests that can be performed to determine the existence of brain damage, physical brain damage?

A I gave one of them, and that is the Halstead Raycon neuro-psychological test battery.

Q I'm talking about a test that actually measures [1498] the brain, that actually measures the brain physically?

A There are medical test that physically are very helpful in detecting a focal or a specific lesion, or infaction, like in a case of a stroke or a hole or a tumor there

are medical test that are very good at that, if there is a particular point in the brain that is damaged.

Medical tests are not good at how sensitive it is, if it is a generalized loss of brain functioning, that happened a long time ago, it doesn't show up on those medical tests, that is why we would like to instead, we look at the person's behavior, that is a reflection of brain functioning in cases of generalized brain damage.

Q With the medical test, though, the medical test that we are talking about, would they be helpful?

A They would be helpful if there was a tumor a lesion and an infaction, something that is a focal lesion point in the brain.

Q Or if there was the contention that a person was – their brain was injured by blows to the head or by a blow to the head, that was so [1499] severe that it injured the brain so badly that it caused the person to become mentally retarded that was not mentally retarded before wouldn't those medical tests be advisable to have performed, have that person's brain examined, and to see if that existed or not?

A No, Sir. Medical test are important, and if there was something that was focal, it would show up. Would not change the results of the neuro-psychological test battery.

BY THE COURT:

Do you have many more questions of this witness?

—

BY MR. PRICE:

Yes, Sir.

BY THE COURT:

At this time, we will recess for lunch. Start back at fifteen minutes after one. You are not to discuss the case among yourselves or with anyone else.

REPORTER'S NOTE: (WHEREUPON AT 12:00 NOON THE JURY WAS RECESSED FOR LUNCH UNTIL APPROXIMATELY 1:15 P.M.)

[1500] (JURY IN AT 1:20 P.M.)

BY THE COURT

Alright. You can proceed.

BY MR. PRICE:

Thank you, Your Honor.

QUESTIONS BY MR. PRICE:

Q Dr. Price, I believe, just before the noon break, there you were testifying, were you not? And, I was asking you about a medical test that can be performed to determine the existence of brain damage, is that your recollection?

A That's correct.

Q What type of test are there out there to determine brain damage, medical type tests?

A Well, there would be the EEG, that is an electro-encephalogram. There would be the cat scan, that is

another common one that is used. Some of the newer ones, involve things like the MRI, is the magnetic reasoning imaging, which is another approach to, I think in the sense of taking a picture of the brain, and there is a pet scan, postivetron emission test, which measures the metabolic activity of the brain. Those are some of the ones that are most common of the medical test used. Really, [1501] the most common is the EEG and cat scan. The others are more experimental and newer tests.

Q EEG been around for a long time, hasn't it?

A Yes, Sir, that's correct.

Q It measures the brain waves?

A Yes. It is the way it measures the electrical activity of the brain, and it comes out in wave, they call it brain wave.

Q Did you notice in your examination of those records, and I think it was in those that were furnished to you, may not have been back in 1965, an EEG was performed on the Defendant, Johnny Paul Penry?

A That's correct.

Q And, what was the result of that EEG in 1965?

A I believe it was in normal limits.

Q And, of course, in 1965, I don't believe they even had a cat scan did they?

A I am not sure as to when it was common.

Q The MRI and the postivetron, or the pet scan has been more recent?

A Quite recent. They are fairly experimental.

Q And, did you earlier sign an affidavit in this matter, in this case, that is filed with the Court, requesting that, or stating in your [1502] opinion, under oath, that those tests that you just mentioned to the jury, should be performed?

A Yes, I did.

BY MR. SMITH:

We would object, Ray vs. Oklahoma, Your Honor.

BY THE COURT:

Overrule the objection.

Q And, in that affidavit, did you say that those tests would be – it would be strongly recommended that they be given?

A Yes, I did.

Q And, the purpose being to substantiate the existence of any brain damage, primarily would it not?

A The purpose would be to further explore and substantiate any of the neuro-psychological findings, if there were any.

Q Okay. Okay. That affidavit was signed and filed back in April of this year, was it not?

BY MR. SMITH:

Same objection, Your Honor.

BY THE COURT:

Objection overruled.

BY MR. SMITH:

[1503] Can I have a running exception on that affidavit?

BY THE COURT:

Yes, Sir.

Q Is that correct, Dr. Price?

A April 24, 1990.

Q Okay. Did you, or has Defense Counsel furnished you with the results of those tests?

A I have had some feedback about the results of those tests, Yes, Sir.

Q What was the feedback that you got about the results of the tests?

A That they were – that they were normal.

Q The EEG was normal?

A That is what I understand, yes.

Q The cat scan was normal?

A Yes, Sir.

Q The MRI was normal?

A Yes, Sir.

Q And, the postivetron or pet scan was normal?

A Yes, that's correct.

Q Did they also request that certain genetic screening be done?

A Yes, I believe so.

Q What is the purpose for genetic screening?

[1504] A My understanding that there are some of the genetic syndromes that may lead to retardation, can be detected with those medical tests.

Q Okay. Did you get some feedback on the results of that genetic testing?

A My understanding that they found no genetic inherited syndrome there.

Q In other word, he is normal?

A Genetically, according to those tests, Yes, Sir.

Q The inherent chromosomes were normal, is that correct?

A The results of those tests were normal, I don't know if they test every single thing about the chromosomes, but, the results of those tests were normal.

Q Okay. Not a single one of those medical tests indicated any kind of a brain damage, did they Doctor?

A That's right.

REPORTER'S NOTE: (WHEREUPON STATE'S EXHIBIT NUMBER 104 WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

Q You know where those tests were performed?

BY MR. SMITH:

[1505] Objection to that, beyond the affidavit.

BY THE COURT:

Objection overruled.

A It is my understanding that they were conducted at the University of Texas Medical Branch at Galveston.

Q Same place we go back to where we started in 1965, isn't that right, Doctor?

A With this case, that's correct.

Q The first record on Johnny Paul Penry, that is where they started, University of Texas Medical Branch in Galveston, in 1965, is that correct?

A I believe so.

Q And, the first EEG was normal, was it not?

A Yes, Sir.

Q Now, I want to show you what has been marked as State's Exhibit Number 104 and ask you could you look at those test results and see if they do not represent those tests that you just testified to?

A There is a disal one, here as well.

Q What is a disal?

A That would be the Tec Scan.

[1506] Q What kind of tests is that?

BY MR. SMITH:

Objection to all of the tests, Your Honor. Can I have a running exception and objection on that.

BY THE COURT:

Objection is overruled. You can have a running exception.

A Sort of an updated version of the cat scan, as I understand.

Q A little more advanced cat scan?

A Experimental.

Q Would the test results that are reflected here by State's Exhibit 104, represent the current state-of-the-art in medical testing for brain damage?

A I am not a medical doctor, but, it is my understanding that this certainly would be considered the spectrum of the tests they could perform at this time. I suppose there could be something else out there that I am not aware of, but, this looks like an adequate examination from a medical point of view, yes.

Q And, they all show that he is normal, isn't that correct?.

[1507] BY MR. SMITH:

Your Honor, the Fourth Amendment objection and this is the objection that I stated previously.

BY THE COURT:

Objection is overruled.

BY MR. SMITH:

And, 801, 802 of the Texas Code of Criminal Procedure.

BY THE COURT:

Objection is still overruled.

Q Do they all show normal?

A They all show normal results.

BY MR. PRICE:

Offer into evidence, State's Exhibit Number 104.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

Your Honor, I object to these exhibits under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution; under the sections that I just mentioned of the Texas Constitution [1508] and sections that I just mentioned of the Texas Code of Criminal Procedure, under AAACK against Oklahoma, and renew all of the objections that we made to the search warrant that Your Honor ordered.

BY THE COURT:

Objection – State's Exhibit 104 is admitted over the objection of the Defense.

BY MR. PRICE:

Could I exhibit these to the jury, Your Honor?

BY THE COURT:

Yes, Sir.

(END OF CONVERSATION HELD AT THE BENCH.)

Q Doctor, I want to show you State's Exhibit Number 101 (A) which is a report from Dr. Pebbles dated May 19, 1977. I believe that is a report that you previously indicated to the jury that you have examined as part of the record in this case, is that correct?

A Yes, that's correct.

Q I am going to direct your attention first of all, this was made by Dr. Pebbles, on what date?

[1509] A May 19, 1977.

Q Okay. Was this a court ordered, asfaras you could tell from the report, a court ordered examination pertaining to the competency and sanity of Johnny Paul Penry in 1977.

A Yes.

Q Okay. Did Dr. Pebbles, in this report, find him both sane and competent to stand trial at that time?

A Yes.

Q I am going to ask you to further read to the jury, first sentence in the last paragraph, on that Page 3.

BY MR. SMITH:

Could I see that? I don't have a copy.

Q Would you read that sentence to the jury?

BY MR. SMITH:

I object, Your Honor.

BY THE COURT:

Objection overruled.

BY MR. SMITH:

On the grounds previously stated with regard to the lack of basis for the opinion on dangerousness.

[1510] BY THE COURT:

Objection is overruled.

A Dr. Pebbles says, "It is my further professional opinion that if Johnny Paul Penry were released from custody, that he would be dangerous to other persons."

Q Is this on May 19,1977, is that correct? That's Correct.

A And, if the evidence in this case shows that shortly after this report, that Johnny Paul Penry was convicted of rape, sent to the penitentiary and then, a little over two years later, in 1979, he was released and then, approximately sixty days after his release, he murdered and raped Pamela Carpenter, would you say that prediction of Dr. Pebbles pertaining to him being dangerous to other people was true?

A Yes.

BY MR. SMITH:

Same objection.

BY THE COURT:

Objection overruled.

BY MR. PRICE:

I will pass the witness.

[1511] REDIRECT EXAMINATION

QUESTIONS BY MR. SMITH:

Q Dr. Price, you remember that Mr. Price asked you some questions about anti-social behavior? You remember that?

A Yes, I do.

Q Do you have an opinion of any kind, Sir, as to whether brain impairment or mental retardation are a substantial part of the cause of Johnny Paul Penry's anti-social behavior?

A Yes, I do.

Q What is that opinion?

A I think in this particular case, that the extent of mental retardation and brain impairment are substantial factors in the development of anti-social behavior in Johnny Paul Penry.

Q And, the usual case of anti-social personality disorder, Sir, is that true?

A No, it is not true.

Do most anti-social people have brain problems or not?

A There is a lot of speculation about the case of anti-social behavior, but, typically, they are considered to be individuals of average or even sometimes above intelligence, that do not [1512] have brain impairment.

Q I think you told Mr. Price, Sir, that you had the experience of dealing with people who are not motivated when they take the Halstead Test. Did you have this experience this time?

A Not at all.

Q Did you find him to be motivated?

A Yes, Sir.

Q Let me turn to this subject of faking, Doctor. I covered it on direct examination, but, Mr. Price talked so much about it, I want to go back to it. Tell us again, wholly and clearly exactly what you did as to testing whether Johnny Paul Penry was faking.

A Well, in the first place, as we went over in cross examination, in cases like this, it would be a kind of suspect suspicion, and the one that conducted this sort, or any sort of examination within a case such as this, would have to be conscious of the possibility and I looked at three different areas to determine if he was faking or if stated another way, malingering, which is looking like you have a mental disorder that you don't have. I chose three [1513] different areas to examine to see if that was the case. First, was to review previous psychological and psychiatric evaluations and typically, if somebody is a malingerer, they are faking, they don't have a record like this, they don't have test and evaluations going back to the age of nine. They are fine.

Q Not too many nine year olds fake their tests, is that correct?

A It is not likely they fake it to look bad, no.

Q Go ahead.

A And, you see, if it is a malingerer, they don't have any of the signs until they are charged with the offense, and then, all of a sudden, very suddenly, they develop a mental disorder, and that is one of the clear cut clues of a sudden onset. If it is a gradual onset or you have an onset that goes back before the date of the offense, it is less likely that the person is faking and that was the case here, that there were examinations from the age of nine that indicated brain damage and mental retardation. The second area, is to observe the person [1514] during the testing as we talk about, people that are faking, typically, they don't fully cooperate they quit some are even hostile. I have had them walk out of my office and say they are not going to do this any more, so, that they are non-cooperative and if they are going to fake and continue, they don't – you can tell they are not putting forth their full effort, because they will stop in the middle of a task, if it is a paper and pencil test that we sometimes use, and they will just fill in the answer randomly just to get it overwith. The sign of faking is non-cooperativeness. I did not see that in this case. While he would work steadily, though, in effect, his strategy on many of the tests, were measuring brain functioning, he responded to the fact that if you do one well, it seems, a lot of people do, really get caught up in the task and they actually seem to enjoy them. So, there is the behavioral observations that he was cooperative. The third area is to analyze the pattern of the

test results, and if somebody is faking, they fake what they perceive the disorder to [1515] be, they don't really know, so they have an idea in their head, what it would look like. So, they are inconsistent, they seem to miss some items or get the harder items right or they do like in the Halstead Battery two tests that measure very similar functioning, the speech/sound test and the other one is a rhythm discrimination test. So, they will do maybe poorly on one of those and real well on the other. That is inconsistent. You don't see that with brain impaired people, they do poorly on both of them, so, they are inconsistent. If they are fakers, they are inconsistent. I didn't see that in this examination. There is also certain test that fakers tend to do poorly on when they are trying to fake having brain impairment. They tend to do the finger tapping and grip strength and also, the sensory perception, touch and vision, and those with true brain impairment score the lowest on other tests that measure attention, concentration, higher order processes, like when it comes to logical analysis, and they do the best of those other tests. So, this [1516] is a really interesting approach to discrimating fakers from those that have brain impairment, and, in fact, the test that was the lowest for Johnny Paul Penry were those concerning category attention trial tests, textual performance test, those involving attention in concentration logical analysis and his highest scores were the performance, was to the sensory perceptual exam, and after that, the next highest is finger tapping and grip strength. So, he has the patience of an individual with brain impairment rather than that of a malingerer, and then, a third thing, in terms of pattern present them a task that is real easy, tell them that it is hard and you are

actually faking to see if they will fake and if they do, really poorly, on this fairly easy task, the fifteen item test, then, that is a sign that they are intellectually trying to do badly, or fake, and he did not do poorly on that. Those are the things that I was particularly interested in in terms of a determination if he was faking or not.

Q Mr. Price, asked you specifically, about that puzzle, textual performance test, and he said, [1517] he suggested to you that maybe eleven minutes the first time, fourteen minutes the second time indicated faking. Which hand did he do it with the first time?

A His right hand.

Q Which hand did he do it with the second time?

A Left hand.

Q Does the eleven minutes the first time and the fourteen minutes the second time, does that indicate faking to you?

A No.

Q How long did he do it in the third time, when he had to use both hands?

A It was like four minutes.

Q Does that indicate faking to you?

A No, That indicates that there was some transfer and some ability to learn there, and that if he was faking he would have even probably taken longer on the third trial.

Q Now, Mr. Price asked you about the judgment call, whether your bias effected your judgment in scoring this test, do you remember that?

A Yes, Sir, I do.

Q Just, Doctor, this may take a minute, but, you say that you gave him nine tests?

[1518] A Yes, that's correct.

Q Just tell us one at a time what those nine tests were, what kind of results you got and what kind of a judgment you had to do on each of those nine tests?

A The nine tests in the Halstead/Raycon Battery, that I administered, the first is the Afasia Screening Test, which is the one that most depend upon their ability to understand and use language functioning. Also involves some test for Afasia, which is how they draw things, copying something that they don't turn the things upside down or grossly distort them, and, that is a test where you either get right or you don't. It is not a test where there is a lot of ambiguity. Also, if you see any signs on this test, is pretty clear that something is wrong in the brain, because it really, again, it actually is a pretty easy item, and they either get them right or wrong, there is no gradation of scoring.

Q Give us an example of one of those easy items?

A You show them a card that has a cross drawn on it, and you say, draw this and they have to draw it and you say, now, tell me what this [1519] is, now, write what this is and you are getting at something really very simple, and it is either right or wrong.

Q Either he draws a cross or he doesn't draw a cross, right?

A It could be grossly distorted, but, if it looks basically like the cross on the card, you count it right.

Q Okay. Go ahead.

A Another item on the Afasia Screening Test are like that, as well, they are relatively simple either/or.

The next test that I gave was the Sensory Perceptual Exam which is one of the most subjectively, it is a test that takes the most skill to administer, and involves things like you have them close their eyes, and if you touch them on – on some finger, either on their right hand or their left, and they are suppose to tell you if it is right or left, and also, that you number the fingers, and they have to tell you if it is the thumb, first second or third finger, and also, make a very slight kind of a snapping sound in their ear, and you ask them to tell you if it is right [1520] or left and then, you go and alternate these and you can do it any way you like, but, you are alternating them and then, you also have sound in both the ears, at the same time, and if there is a problem there in that level of brain functioning, and often times they don't hear it in terms of simultaneous presentation and they will say either right or left. Also, involved in that is to see if there is a sealed cut in terms of their vision. If they can see in terms of – , so the administrator of the exam is just doing those things with the individual. His performance on that test was adequate, it was perfectly normal, I think there was one or two areas but, that was not enough to indicate that that was an abnormal performance.

The speech/sound perception test, and the rhythm discrimination test are presented on a tape, it is a cassette, you play it for them, and in the case of the speech/sound perception, thee is a sheet in front of them and they are suppose to identify the sound that they hear by taking a pencil and under-lining on the other one, which is the rhythm [1521] test, it had two series – had patterns on the test, where it is sort of like a patterned bench, and you have them tell you if the new patterns are the same or if they are different, and they say, same, you mark down same. If they say different, you mark down different. This is for the ability to concentrate and the ability to stay on a task for the time period that it takes, and the answers are either right or wrong, so it is in terms of the scoring it is objective.

The next test was the hand dynamotor which is a grip strength, it is a apparatus, with the right hand and the left, squeeze it as hard as you can and look at it. This is another indication where you can see if there is – they are trying hard but you don't know, you have them hold it, down and squeeze it and then hand it to you and you record actually the kilograms that they are able to pull on the apparatus or squeeze and you alternate hands to see if it is consistent, and remember the left side of the brain controls the right side of the body, and also, the other test similar to that with an apparatus that they [1522] tap as fast as they can with either hand and I present a number of tasks with each hand. You do this three to five times with each hand and average them.

The trails making test, sort of like a dot to dot test, and if you could see if they sequenced things, keep it right or the first part is relatively simple, just strictly

numbered parts, alternate numbers and letters from a to a, 1 to 1, or b to c, and you time them on that to see how fast they can do it and your right down the times.

Textual Performance Test is one I had in Court, and I showed you the puzzle, where you blindfold them again, you observe them to see if they are continuing to try without just setting there and after that, you time it and the score is timed, and afterwards, you give them a piece of paper and say, draw me if you can, you count the number on this fan, and its either right or wrong, the location score.

The final test in that battery, is the category test, which is a – it is a series of acts, that you present them with different patterns and they have to figure out the [1523] pattern and tell you if it goes through each of the sub-test, and an answer, is either right or wrong, and you told them that's right or that is wrong, and the idea is that they learn from feedback and pick whether the concept was either right or wrong, so, the scoring of these tests, is objective.

Interpretation, there are guidelines and rules and certain patterns of scores are very clear and very incompetent neuro-psychologists would come up with the same interpretation. There is a cut-off, a person is either brain impaired or they are not. Those involving interpretations are more subjective or in cases where you have some process that is going on that is effecting one part of the brain, like a tumor and that can be subjective in terms of interpretation there, to try to decide where the tumor is. Those are the test results.

There was another on subjective interpretation in the case where these results, because of the brain damage, is generalized. It is not any particular area, several areas of the brain, and the interpretation is not as subjective as it would be if there was a tumor [1524] or some other gradual onset kind of dimensional and some that are not difficult to make an interpretation of the test results, and, that that interpretation would be subjective, you have to take a guess, and that has happened in cases, a diffused type of brain impairment, such as this interpretation is not so contested.

Q Doctor is there in your judgment any substantial likelihood that a different examiner with a different bias could reach different conclusions from the test that you gave?

A Not if he is competent, no.

Q And, you testified for the State, sometimes, in criminal cases?

A I have, Yes, Sir.

Q And, if you were doing these tests for the State, would you do it the same way you did do it?

A That's correct.

Q Now, I want to talk about this subject of IQ. Before I get to IQ, I want to take you back briefly to the medical records. You remember that exhibit had an EEG and all of those things? Do those test results change in any way your opinion that Mr. Penry suffered [1525] some brain impairment?

A No, it did not.

Q Why not?

A Those tests are intelligence tests. I have actually, as he pointed out signed an affidavit in this case asking for those tests to be done. They are, and they are increasingly being better, like every task, whether it is neuropsychological or medical, they don't show everything, and those tests are for determining brain damage, that has resulted in brain dysfunction, and it is a – thing, there is brain damage that showed up, brain impairment, and if there is something that takes up space in the brain, a tumor, if there is a hole in the brain, sort of like an absess, and on some of the other ones that are more experimental theory, lets get to the cat scan, if it is a metabolic disorder if a person has some type of infectious process that is taking place, those are intelligent testing and they are getting better.

Asfaras pointing to a particular part of the brain and saying there it is, there is something taking up space, there is also, [1526] if the brain is swelling, they are especially useful in an injury. That's why many times, when you have an automobile accident, and they had to do these types of tests if you had a head injury, they are especially helpful with the current injury, because they are excellent and cite exactly what it is, and help in the medical management of the patient. Those tests are like the others, no matter what kind of test they are, some things they are not good for, and I would always like to see these in any type of evaluations, that they are not good for identifying injury that took place a long time ago, or some kind of a process that took place years ago, not good for identifying generalized brain damage. The process is a loss of neurons, and there is a procedure

called sheering, that the brain is – it is pulled over to one side, and underlying pattern, not in one particular place but over a larger section of the brain. Those medical tests are not good for those kinds of brain damage, and that is why they didn't show anything in this case, in my opinion.

Q Now, I will ask you about IQ. Mr. Price, [1527] mentioned IQ scores to you on your cross examination. Did he mention all of the IQ scores that you have seen for Johnny Penry? Do you remember?

A I don't really remember if he did or not.

Q What I want to know, just so nobody gets fixed up, I am going to try to write down the results of every IQ test that this guy ever had asfaras we know. I want to show them to you and see if they are consistent with your testimony.

A Okay.

Q Now, first, let me show you a document that I am not sure that you have seen before. You have seen Defendant's Five in evidence.

A This is a letter from the principal of an elementary school, and it is not – it was not in my file.

Q Okay. But, that is in evidence. May I have it back?

A Yes.

Q And, that letter is dated in 1965, and it says, "Scored about 60 IQ on test administered by Cameron McKinley-about two years ago," before 1965?

A 1963.

[1528] Q Okay. 1963, about sixty?

A Yeah.

Q Is that consistent or inconsistent with your conclusion that Johnny Penry is mentally retarded?

A That is consistent.

Q Now, you have a document, I believe, dated August 25, 1965, You have that psychological report there?

A Well, actually, all of the file that I had, are now placed in exhibits, but, I have those on a piece of paper, so, I can still follow this without having the document.

Q He took it away from you, but, you remember?

A Right.

Q And, on August 25, 1965, –

BY MR. PRICE:

I am going to object to that last comment. It is in evidence. BY MR. SMITH:

I didn't mean to suggest anything Mr. Price.

BY MR. PRICE:

If the witness is offended by me taking his records away from him, Lord, I got all kinds of records over here, I [1529] would love for him to take them back to Dallas.

BY THE COURT:

He has enough records, let's proceed.

Q Now, in 1965, try to do this so everyone can see, try to write legibly, which I very rarely do. In 1965, there

was a verbal and a performance and an overall score, right?

A Yes, that's correct.

Q Okay. I am going to write up here, "V" for verbal, and "P" for performance, okay? Can you read my writing?

A Yes, Sir.

Q Does my "P" show signs of brain damage?

A It might.

Q Thank you.

BY MR. PRICE:

At least impairment.

Q What was his verbal score in 1965?

A 72.

Q Okay. And, what was his performance score in 1965?

A 47.

Q And, what was the full scale score in 1965?

A 56.

[1530] Q And, that is consistent or inconsistent with your conclusion that Johnny Penry is mentally retarded?

A Consistent.

Q Okay. What is the next IQ score that you are aware of?

A 1968.

Q 1968? We have got a twelve year old now, correct?

A Yes, that's correct.

Q And, we have a verbal there?

A Yes, 55.

Q 55. What is the performance score?

A It is also 55.

Q And, what is the full scale?

A It is 51.

Q And, someday, not now, because it would take too long, to explain to me how a professional averages 55 and 55 and gets 51?

A It is not an average, it is a different set of forms for the full scale IQ.

Q Okay. But, what happens?

A I have seen that happen before.

Q Does that happen sometime? And, what is that consistent or inconsistent?

A That is consistent.

[1531] Q With your view that he is mentally retarded?

A It is consistent.

Q Okay. What is the next time, asfaras you know, that anyone ever gave him an IQ test or give him any kind of an IQ score?

A 1973.

Q Well, before you get to '73, let me show you Defendant's Exhibit Seven already in evidence, a copy which is dated June 10, 1971. Have you seen that before?

A Yes, I have.

Q And, what is that?

A This is an educational prescription that I believe was from the school.

Q Does that say anything about his IQ in 1971?

A Yes, it says that the results were generally in line with his measured IQ of 51, which they actually obtained from doing a chronological age, comparing his mental age, and as a result with have a general IQ score there of 51.

Q So, they did some kind of a process that they said was consistent with the 51 IQ?

A That's correct, yes.

Q They didn't do a separate IQ test, but, they took a look and looked back and said it looks [1532] consistent with the 51 score in 1968?

A Yes, that's correct.

Q Okay. Tell me again where the cut-off for mental retardation according to the standard case?

A It is 70, is the cut-off.

Q Now, will you tell me about this 1973? In 1973, there are a few different documents there.

A Yes, these were – it was the first set that came from the school system, the Goose Creek Independent School District.

Q Okay. Documents there dated January 23, '73?

A January 23, of '73, overall IQ was less than 50.

A Okay. Gave him some kind of a test in Goose Creek, then, in January of '73, came out less than 50, right?

BY MR. PRICE:

Could I see that document, please?

BY MR. SMITH:

That is Defendant's Exhibit Number Three in evidence.

BY MR. PRICE:

Could I see it?

Q If it had showed something less than 50, –

[1533] A Less than 50.

Q Get the idea?

A Yes, Sir.

Q And, then, you have an IQ of some kind of IQ test in September of '73?

A Yes, Sir, the Austin State Hospital.

Q At Austin?

A Yeah. They did a short form of the IQ test and said that the IQ was approximately 50.

Q Okay. About 50. And, then, in October of '73, did they do another one?

A Yes, that was at Rusk State Hospital.

Q Okay. That they gave a verbal and performance in a full scale, right?

A Yes, that's correct.

Q What was the verbal?

A The verbal was 50 – 69.

Q 69. What was the performance?

A 74.

Q And, what was the full scale?

A 63.

Q And, was that consistent or inconsistent with mental retardation?

A That is consistent.

Q Okay. Now, in November of 1976, did somebody [1534] test him again?

A Yes, that was MHMR in Deep East Texas.

Q And, what score did they get there?

A They gave a Stanford-Binet, which is the other major IQ test, and came out with an IQ of 43.

Q They said that was 43, and they said that was low?

A They said that they felt that was another estimate of intellectual ability.

BY MR. PRICE:

Where is that document? Where did you get that document from?

A Also, that one goes back to – I don't know the Exhibit Number, on the MHMR.

BY MR. SMITH:

You may put it in, probably. Alright, under estimate next to the 43.

BY MR. PRICE:

Specifically it says, "This appears to be an under estimation of his ability."

BY THE WITNESS:

Mr. Smith, let me write under estimation or under estimate.

BY MR. PRICE:

Doesn't matter.

[1535] Q Okay. Okay. And, is that consistent or inconsistent with mental retardation?

A It is consistent with mental retardation.

Q Even if 43, is an under estimate he is still retarded, is that correct?

A Yes, that would be correct.

Q Then, was he given a test in 1978? I forgot to write down 1976, year here.

1978, did they give him a test?

A The next one I have is 1979, I think from the TRC, that is what I have on here.

Q What is the exact date?

A 9/18/79.

Q Okay. That is a typo here in 1979. What was the verbal score in 1979?

A 56.

Q 56. What was the performance score?

A 72.

Q 72. What was the full scale?

A 61.

Q Okay. And, you did a test in 1990, right?

A Yes, that's correct.

Q What were your results?

A The verbal is 63.

Q Okay.

[1536] A Performance 66, full scale is 63.

Q This man ever in his life, asfaras you know, have an IQ test that didn't show him to be retarded?

A No.

Q Okay. Dr. Price, one more time. What was the purpose for which you examined Johnny Paul Penry?

A To determine if there was a presence of mental retardation and/or organic brain damage, and if so, to what extent.

Q And, tell us one more time, what you found?

A Found that he has organic brain damage, and as a result, brain impairment, which because it started so early in childhood, this diagnosis of retardation.

Q And, Mr. Price, showed you a lot of documents that he asked you whether you had seen and you said you hadn't, seen them. Now that he has shown them to you, is there anything from the test, any doubt whatsoever on your conclusion?

A No, there is not.

BY MR. SMITH:

Pass the witness.

RECROSS EXAMINATION

QUESTIONS BY MR. PRICE:

Q When did you look at the documents?

[1537] A Well, I didn't look at the documents. He asked me if there is anything that I have seen that would change my opinion.

Q But, you haven't seen them yet, have you?

A All the documents that were introduced into evidence, I have not reviewed.

Q Right. So, the answer to that question that he asked you, just like the rest of them, go around it?

BY MR. SMITH:

Your Honor, I think the question that I asked was about the documents that Mr. Joe Price showed to Dr. Randall Price.

Q Which ones did I show you?

A Well, you had me read certain things out of certain documents.

Q Well, the jury is here, they know what you saw.

A Yes, Sir.

Q But, you are not trying to tell us that you looked at all of those records, are you?

A Just the parts that you showed me.

Q You are also not telling this jury that – lets just assume for a minute that he is mentally retarded, mildly retarded, that is what you [1538] diagnosed him, mildly mentally retarded, don't you?

A Yes that's correct.

Q You don't have any problem with that one, do you?

A No, Sir.

Q Okay. And, lets assume that there is some sort of a brain impairment there or organic damage that has caused this mild retardation, okay?

A Yes.

Q That is also you testimony isn't it?

A Yes.

Q And, you are not telling this jury as an expert in your field, that there is any connection between that mental retardation and organic brain damage and the murder and rape of Pamela Carpenter, are you, Dr. Price?

A Not a direct type of connection, no.

Q Right. The only connection as I recall, you said the other day was to lower a person's frustration level or something like that, is that right?

A There are several functional limitations.

Q Frustration was one of them?

A Low frustration tolerance is one.

[1539] Q Okay. Did he get frustrated during that eleven hours of you doing all of that testing and everything?

A Several times.

Q But, he didn't attack you with a pair of scissors, and kill you with them did he?

A Obviously not.

Q Did he attack you at all?

A No Sir.

Q I see. He maintained control around you, didn't he?

A Yes, Sir.

Q He can control himself when he wants to, can't he, Doctor?

A He did then.

Q Okay. Do you have any reason to believe he couldn't at any other time when he wanted to?

A Well, I could see circumstances where his ability would be less than someone without brain impairment, but, he controlled himself around me.

Q Okay. Eleven hours worth of testing and conversation and everything else, he controlled himself, didn't he?

A Yes, Sir.

[1540] Q Pamela Carpenter would probably be one of those situations that you are talking about where he might not control himself, you would probably agree with that, wouldn't you?

A Yes, Sir.

Q Have you seen his confession?

A No, Sir.

Q Do you know anything about how that murder occurred?

A Yes, Sir.

Q You do? Where did you get the information?

A From Time Magazine from articles that I am aware of, the facts of the case.

Q You are aware that he, – well, are you aware about the facts of the case?

A That he raped and killed the victim? That's what he confessed to as I understand it.

Q What else? How did he do it?

BY MR. SMITH:

Your Honor, I don't see that this bears any weight on the expert's testimony, here. He is just attempting to repeat certain things to the jury.

BY THE COURT:

Sustain the objection.

[1541] Q You said earlier when he asked you a question, about motivation, your response was in regard to Mr. Penry when he took this test of yours, he was motivated, is that correct?

A Yes, Sir.

Q Could have been motivated to malinger, too, couldn't he?

A Yes, Sir.

Q In fact, someone that is facing the possibility of a death penalty, it would be logical to assume that they would be motivated to malinger in that type of a situation

BY MR. SMITH:

My only objection is that he has been asked that at least five times.

BY THE COURT:

Let him answer it one more time.

Q Would that be logical to assume that they would be strongly motivated to malinger?

A Seems to me that the would be.

Q You have him drawing a cross. It would be very easy to for him to draw a circle instead of a cross, wouldn't it?

A He did the cross pretty well.

Q And, you talked about judgment calls, that just [1542] kind of brings something to mind. You said one of the examples that you gave this jury was drawing a cross, and you showed him a cross and then, maybe he would draw one like it?

A The cross is like this, it has that appearance it is important.

Q What you mean like this?

A That is approximately what we asked him to do.

Q Okay. But, then, if he draws it like this, and you are the testor, and you are biased, and you are there to achieve a result, you can call that an "x" if you want to score him low or you can say well, he is a little, just a little bit off center, that is really a cross, so, I am going to give him a score for it, couldn't you?

A That would be wrong if he drew the cross like that.

Q If you draw it like that, it wouldn't be called a cross?

A No.

Q You would call it an "x" is that what you would call it?

I guess if I draw it that way, that would be a case of mental retardation or something?

[1543] A If I saw other signs like that, it would be an indication of brain impairment.

BY MR. SMITH May we see what you showed the witness, Joe?

BY MR. PRICE:

(Handing.)

Q Definitely, some areas that are up to the testor, up to interpretation, is it not?

A Interpretation and experience in administering the examination.

Q And, these medical test that we talked about a while ago, you thought that they were important enough in April that you signed an affidavit stating that they were absolutely necessary in this case, didn't you?

A Strongly recommended that they be conducted.

Q Right. Signed an affidavit under oath to that effect, didn't you?

A That's correct.

Q Now, you are telling this jury, they don't mean anything?

A No, I am not going to say that.

Q Well, I kind of heard that a while ago. Maybe I misinterpreted what you were saying. They [1544] still important aren't they?

A Yes.

Q They don't agree with what your findings are though, do they?

A They don't show what I found.

Q And, this tests, this neuro-psychological whatever kind of test it is, it isn't – it is sort of locate and pinpoint the area of the brain where the damage is?

A Sometimes it can.

Q Isn't that – not sometimes, isn't that what it is suppose to do?

A Unless there is no particular area of the brain that is damaged, and the damage is over a lot of the parts of the brain, it is generalized damage that is what the test shows.

Q Normally, that test will isolate and point out the specific portion of the brain that is damaged, would it not?

A Well, I can point out parts of the brain that are damaged, from this test, but, in his case, there are several parts to the damage.

Q The whole brain, then, is that what you are saying?

A Several parts. The damage is spread it is [1545] diffused it is generalized.

Q Tell us what parts are damaged to Johnny Paul Penry's brain?

A The cortex.

Q Where is that?

A The outer part of the brain.

Q The entire outer portion of the brain?

A No, the entire brain is not damaged. The damage is spread out over different parts of the brain.

Q What is the cortex? I don't know what the cortex is.

A Cortex is the outer portion of the brain, the portion of the brain that is different in humans, than other animals. Our cortex is thicker, no intellectual function.

Q The front, back of the head, either side, on top, where is it?

A Yes, all of those.

Q All of those?

A Yes.

Q So, basically what you are telling us, the whole brain, the whole area?

A There is damage spread throughout the cortex but the sub-part of the structure, don't show any impairment. There are parts of his brain [1546] that are functioning perfectly normal.

Q On the inside?

A Yes.

Q But, all of the outside of the brain is damaged?

A I'm not saying that. I am saying that the damage is spread out over the outside of the brain in different parts.

Q So, spread out and so hidden that not a one of these tests could find it?

A That's right.

Q And, these tests, one of them measured the brain waves, the electrical wave that goes through the brain, doesn't it?

A That's right.

Q That is the EEG?

A Correct.

Q Okay. What does the cat scan do?

A The cat scan takes x-rays of the brain at different slices, or at several sections of the brain, throughout the brain, not just the cortex, but the sub-cortex structures as well.

Q It measures in slices of the brain throughout does it not?

A That's correct.

Q That's correct. What does the pet scan do?

[1547] A The pet scan measures the way the brain is using energy and it is a metabolic activity of the brain.

Q Okay. That is a different function of the brain all together?

A Yes, that's correct.

Q That it measures? Okay. What is the other test that was done, MRI, that's what it was?

A Right.

Q What does the MRI do?

A Well, it also, proves the injection of radio – it also has a picture, it has a result of getting an image of the structure of the brain.

Q The whole brain?

A Whole brain.

Q Cortex and all?

A Cortex and all.

Q Just like the cat scan, also, when it slices the brain and gives us individual sections, it gives you the cortex in that area, does it not?

A Yes.

Q No sign on either one of those test, that there was any adnormalities, here was there?

A That's correct.

Q And, then, the genetic test there that has to [1548] do with inheritance and chromosomes, does it not?

A That's correct.

Q And, he is normal on everyone of them?

A That's right.

Q Did I understand you correctly on indirect examination just a few minutes ago, to say that brain damage is a cause of anti-social personality?

A I said that can be one contributing factor, to anti-social behavior.

Q You didn't say it was a cause, now, of anti-social personality, did you?

A What I just said, it could be a contributing factor in some cases, to anti-social behavior.

Q Can you tell us some of the authority on that subject, that backs you up in what you just said?

A Well, it would be, if you took a look at the –

Q I'm talking about recognized authorities in your field that have written books, papers or anything else that says what you just said?

A There are some. There are, in fact, some articles published about that. I don't have the authors memorized on that.

Q That says that brain damage is a contributing factor, in effect, is one of the causes of [1549] anti-social personality?

A It may be contributing to anti-social factor.

Q Maybe, it is?

A That's what I said the first time.

Q Maybe is what you said?

A Yes.

Q Maybe it is a contributing factor. You are not telling this jury that it causes anti-social behavior are you?

A In this case, it is a contributing factor.

Q How do you arrive at that?

A That, it leads to some of the same behavioral traits that you will find in DSM-3 that describes anti-social behavior that brain damage can lead to some of the traits, it can lead to apparent anti-social behavior or frustration tolerance, impulse control problems or judgment. So, correctly, it can lead to it.

Q Indirectly could lead to it?

A Not, directly.

Q Can you cite me one book, one authority, one article, one periodical anything that says what you are saying up there on that witness stand as testifying under oath to the jury, is true?

A I can't off the top of my head, give you a [1550] citation. I do have some on that.

Q Don't you think that is all important in this case in particular?

A It seems logical to have it as indirect association as well.

Q But, you don't have any of the articles and don't know any of the authorities?

A That's what I said, yes.

Q I guess we can get the court reporter to read it back, but, you sure didn't say on redirect examination that the soci-pathic personality of this Defendant was caused by mental retardation and brain impairment, in your opinion?

A Well, as I recall, I said in this case, the organic brain impairment and mental retardation are contributing causes of his anti-social behavior. You can have him read it back, but that's what I recall I said.

Q Anyway, we are clear now, you are saying that it is a contributing cause?

A there are other causes.

Q What are those causes?

A The way the person is brought up, their family background.

[1551] Q The way a person is brought up can cause them to have anti-social personality?

A In terms of their values, there is.

Q Dr. Price, I am not asking you about some of the traits. I know that you like to use the word traits, indigitive of or indicators or whatever, but, I am asking you somebody that has an anti-social personality, diagnosed, just like Mr. Penry has been diagnosed over the last fifteen years as being anti-social, someone is diagnosed as anti-social, what are the causes of that?

A They don't know for sure.

Q Alright.

BY MR. PRICE:

I will pass the witness.

BY MR. SMITH:

No questions Your Honor.

BY THE COURT:

You can step-down, Dr. Price. Would you all approach the bench just a moment. Do you have any other witnesses?

BY MR. SMITH:

No other witnesses, Judge, but, we have some exhibits. Take a short break.

BY THE COURT:

* * *

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

* * *

[50:1610] DR. WALTER QUIJANO

called as a witness on rebuttal by the State, having first been duly sworn to tell the truth, testified on his oath as follow;

DIRECT EXAMINATION

QUESTIONS

BY MR. PRICE:

Q State your name for the jury, please, Sir?

A My name is Walter Quijano.

Q Where do you live, Dr. Quijano?

A I live in Conroe, Texas.

Q And, are your a married man?

A Yes, I am.

Q Okay. And, what is your occupation or profession?

A I am a clinical psychologist.

Q And, could you just give the jury a brief summary of your background and education in the field of psychology?

A I have a Bachelor's Degree in Psychology from the University of San Carlos in the Philippines, where I was born. I have a Masters' Degree in Clinical Psychology from the University of Hawaii, and then, a Doctors' Degree in Clinical Psychology, also from the University of Hawaii.

I completed the required clinical psychology internship by the American Psychology Association. [1611] I am licensed in the State of Texas with the highest level of licensing that is the Health Service Provider.

I am also licensed in the State of Oklahoma and Nebraska, where I used to work

My work expereience includes being a psychologist – staff clinical psycholigist at the Federal Prison in San Madro, California. I was staff psychologist doing chemical abuse treatment at TDC in '75, 1975. I was forensic psychologist at the State Hospital in Nebraska. I was Chief Psychologist at a State Hospital in Oklahoma, where I did work with the forensic program, working with prisoners as well as doing competency and insanity evaluations.

I have worked in the private setting, including work with drug abuse programs. In 1984, I was called by TDC again to be Chief Psychologist for the entire system, where I stayed until last year.

Since then, I have been in private practice, and my work includes, clinical cases, patients, that I see in my office, I teach at the University of Texas Medical School Family Practice Residency Program in Conroe, Texas.

[1612] I do some clinical work in the Montgomery County Jail. I do competency and forensic and other consultations with the District Courts in Montgomery County. I have done similar work in Harris County, Lubbock, Dallas, did my most recent one, I consult with the Texas Rehabilitation Commission in screening applicants who are cliaming mental retardation or mental illness, in applying for benefits.

That is my work history.

Q Back in 19 – did I understand you correctly, from '84 to '89, you were clinical psychologist for the Texas Department of Criminal Justice?

A Yes. I was Chief Psychologist then.

Q The Chief Psychologist?

A Yes.

Q And, prior to that, you worked in a hospital in Oklahoma, is that correct?

A Yes. I was Chief Psychologist there also.

Q What type of hospital was that?

A It was a State Hospital and we took care of a third of Oklahoma. First, all of the mentally ill inmates in the Oklahoma prison system was sent to us for treatment. We also did all of the State's competency and insanity evaluations.

[1613] Q Okay. You don't look old enough. When did you first start working as a psychologist?

A Oh, 1975. August 5, 1975.

Q Have you written any types of periodicals or articles or any kind of publications in your field?

A I have written a few publications. I want to write more, there is no time to do it. What I have done instead is make sure that on an almost annual basis, that I try to be present in professional conferences.

Q Have you been called in on professional conferences and seminars and things of that nature?

A Yes, I have.

Q And, would you be teaching other members of your profession in that area?

A Yes, I do.

Q What professional associations do you belong to?

A I belong to the American Psychiatric, – American Psychological Association, the Texas Psychological Association, the Association of the Advancement of Behavior Service, and the American Service of Correctional Psychologists.

[1614] Q And, I believe that you have already indicated to the jury, that you are licensed in your profession in three states, Texas, Nebraska, and Oklahoma, is that correct?

A Yes, I am.

Q Have you had any prior experience in working with the mentally retarded?

A Yes, I have.

Q And, what experience have you had in this field?

A Part of my doctor's training, I was assigned to a home for the mentally retarded in Pearl Harbor, particularly in Oahu in the State Hospital. I had occasion to work with a few mentally retarded patients who became unmanageable in the State school system

In my work, with the Texas Rehabilitation Commission, one of the most common claims for benefits is mental retardation, and when I was Chief Psychologist in TDC, I was privileged to develop the non-existing Mentally Retarded Offender Program as required by the Federal Court Order.

Q Okay. You actually set up the Mentally Retarded Offender Program inside TDC that is in place [1615] today?

A Not the old one, but, I was a principle figure, I was chief then.

Q Could you kind of tell the jury a little bit about psychology and what you do in your field? What does psychology involve?

A Psychology is really the study of human behavior. They are granted in psychology that studies human nature, human behavior called the basic scientist, and the basic sections are parts of psychology. If you took those bodies of knowledge and added a component of abnormal behavior and used them to recognize and manage or treat abnormal behavior, it becomes what we call clinical psychology, and I am a clinical psychologist. My job is to apply the basic knowledge that we have about human nature and human behavior in the recognition and management of abnormal behavior.

Q Have you performed a competency examination in other words, examination on individuals charged with crime, to determine their competency to stand trial, as well as their sanity at the time of the commission of their crime?

A Yes, I have.

[1616] Q Have you done that on many occasions?

A Sir?

Q Have you done that on many occasions?

A Oh, yes, yes.

Q Generally, have you worked in the criminal justice system for a number of years with respect to people that have psychological problems?

A Yes, I have.

Q Do you know the Defendant, in this case, Johnny Paul Penry?

A Yes, I do.

Q Have you previously had an opportunity to interview the Defendant?

A Yes, I have.

BY MR. SMITH:

Your Honor, at this time for the record, I am renewing an Estelle vs. Smith objection.

BY THE COURT:

Overrule the objection.

Q When was that interview?

A I was requested and I complied to examine him in May, 1990.

Q And, how long did that interview last?

A About two hours.

[1617] Q Okay. Who was present in addition to you and the Defendant, Johnny Paul Penry?

A It was a strange interview, because I normally interview people, -

BY MR. SMITH:

Your Honor, I object to the volunteered comment of the witness as to -

BY THE COURT:

Restate your last statement. Disregard the last statement.

Q Who was present?

A I was there, Mr. Penry was there, the District Attorney, Joe Price, you were there and the Defense lawyers, John Wright was there.

Q Okay. Is that a little unusual to have the lawyers present?

BY MR. SMITH:

Objection, Your Honor.

A Yes.

BY THE COURT:

Overrule the objection.

A Yes.

Q In any respect you did conduct an interview that lasted approximately two hours, is that correct?

A Yes, I did.

[1618] Q In addition to the interview, have I previously furnished to you certain records pertaining to this Defendant?

A Yes, you did.

Q Specifically, did I furnish to you his records from the University of Texas Medical Branch in Galveston, back in the 1960's?

A Yes, you did.

Q Did I also furnish to you and I will just go down the list and see if I have them all here, is records from the Texas Rehab Commission; his records from the Austin State Hospital; his records from the Mexia State School; his records from Rusk State Hospital; a competency report from the psychologist, Dr. Wendell Dickerson; the Defendant's TDC Medical Records and Mental Health Records; his records from the Goose Creek Independent School District. Did I furnish you all of those records, Doctor?

A Yes, you did.

Q And, I believe I left out one, here. The Polk County MHMR. Did you review those also?

A Yes, I did.

Q In addition to that, Doctor, did I also furnish [1619] you certain documents pertaining to the criminal history and circumstances surrounding the commission of a crime for which this Defendant, is charged?

A Yes, you did.

Q Specifically, were you given copies of the two confessions given by the Defendant in 1979?

A Yes, I was.

Q As well as some offense reports concerning that?

A Yes, I was.

Q And, were you also furnished with certain records pertaining to the Defendant's prior convictions in a case involving a victim by the name of Diana Koch?

A Yes, I was.

Q And, did you review all of those various records that we just went over?

A Yes, I did.

Q Okay. You haven't memorized all of them, though, have you?

A No.

Q I direct your attention back to the interview with the Defendant, in May of 1990, just a couple of months ago. During the course of [1620] that interview, did you have any problems with communicating with him?

A No, I did not.

Q Did you understand what he had to say to you? Were you able to unerstand him?

A Yes, I did.

Q Did he appear to understand you?

A Yes, he did.

Q Did he talk sensibly?

A Yes, he did.

Q Did you detect any type of mental illness, any type of psychological schizophrenia or any other type of mental illness?

BY MR. SMITH:

Objection, Your Honor. It is irrelevant and mitigating facts.

BY THE COURT:

Overrule the objection.

A No, I did not.

Q Did the Defendant appear to be in touch with reality and know what the circumstances of his surroundings were?

A Yes, he was.

Q Based on your interview there during that two hour period, did he appear to be able to control [1621] himself when he wanted to?

A Yes, he was able to.

Q Did his memory seem in tact to you?

A Memory was very good.

Q Dr. Quijano, I want to ask you just generally, first of all, about mental retardation. If you would, kind of generally tell the jury, what is mental retardation, or how does your profession view mental retardation?

A Mental retardation is a condition in which a person has low average, or below average intellectual capacity or intellectual functioning.

Number Two, that a person's adaptive skills the way that he conducts himself, the way he adjusts to his environment, how he survives, might also be retarded.

And, Number Three, that the deficit, either in the intellectual capacity or functioning or the adaptive functioning must originate before age eighteen. If those three components are present, then, a diagnosis of mental retardation may be given.

Q Did you notice in the Defendant's prior records where he had at various times been diagnosed with different degrees of mental retardation?

[1622] A Yes, I have.

Q Okay. And, is it your testimony that there are two basic components of mental retardation, one, is a below average funtioning ability and second, a below average adaptive skills?

A Yes, that is true.

Q Generally speaking, what are some of the causes of mental retardation?

A Well, the cause of types of mental retardation, is complexed and we really do not know what the precise or the exact cause is. Many possibilities. They range from genetic defect –

Q That would be inherent?

A That would be inherited, yes. Can be from trauma can cause the retardation it could be an infection in the brain, and sometimes there is no cause that can be identified.

Q Are there degrees of mental retardation?

A Yes, there are.

Q And,generally speaking, what are those?

A They generally range from mild to moderate to severe, and then, to profound.

Q As you move from mild to profound does the handicap become more increased and more severe?

A Yes, it does.

[1623] Q Generally speaking, what is considered the mild range of mental retardation asfaras IQ?

A Oh, it is IQ in the sixties.

Q A person with mild mental retardation, can they function in society?

A Yes, they can.

Q Are they educatable?

A Yes, they are.

Q Do they have the ability to know the diffenrece between right and wrong?

A Yes.

BY MR. SMITH:

Objection, Your Honor. Same objection I urged earlier.

BY THE COURT:

Overrule the objection.

Q Do they have the ablity to know the difference between right and wrong?

A Yes, they do.

Q Generally, speaking, with respect to mentally retarded people, are they regarded violent or not violent?

A In general, they are not violent.

Q When comparing the mentally retarded to those that are not mentally retarded, how will they [1624] compare with respect to violence?

A The incident of violenct among mentally retarded is not higher than the people who are not mentally retarded.

Q Is it lower?

A I don't know that. I just know that they are not higher.

Q Okay.

A They could be the same or less, but, the incident is not higher.

Q Has there ever been established any type of a scientific causation between mental retardation and specific criminal behavior?

A No, no, there is not.

Q Just because a person in mentally retarded, certainly wouldn't mean that they would automatically be violent?

BY MR. SMITH:

Objection. He needs to let the witness testify, Your Honor.

BY MR. PRICE:

I will rephrase it.

BY THE COURT:

Sustain the objection. Restate your question.

[1625] Q Because a person was mentally retarded, would that neceassarily mean that he is going to be engaged in criminal behavior?

A No, not necessarily.

Q Just likewise, because a person is not mentally retarded, could not necessarily mean that they would engage in any type of criminal behavior?

A That's correct.

Q Do we have tests and ways of measuring mental intelligence?

A Yes, we do.

Q And, what types of tests are used to measure mental intelligence or intellectual ability?

A There are classic tests, or intellectual testing instruments and the one that is most popularly used is the Wechsler, increment. There are three kinds, one for children, one for adolescence, and then, one for adults.

Q Are these commonly referred to as IQ tests?

A Yes.

Q And, in addition to IQ tests, you mentioned earlier, that in order to be classified as mentally retarded, that first of all, that it requires a below average intelligence functioning is that correct?

[1626] A Yes.

Q Is that what the IQ test is, measures the intelligence functioning ability?

A Yes, it does.

Q You also mentioned adaptive skills. Does that have anything directly to do with IQ tests themselves?

A No.

Q What are you talking about when you say adaptive skills?

A Adaptive skills is the way the person performs on very basic functions, such as the ability to care for one's personal hygiene, taking a bath, keeping clean, changing clothes; the ability to recognize hunger and to want his meals, ability to interact socially, the ability to go buy some things in the store; the ability to engage in recreation activities, watch TV go fishing, hunting, horseback

riding; the ability to recognize pain and take care of one's health, take medication if it is called for.

Q Kind of like normal ability to get along in self-functioning?

A Correct. Activities of daily living.

[1627] Q So, the IQ of an individual, his intellectual functioning capacity, is not the only area that you look at in making a determination of mental retardation, is that correct?

A Yes, that's corect.

Q You would also want to look at adaptive skills and that type of thing?

A That's correct.

Q With respect to IQ tests, are there any factors that might influence the accuracy of these tests?

A Yes.

Q What are some of those factors?

A The factors that need to be considered in looking at the velleity of a test are, Number One, of course the errors that are built into the test, that the test is not a perfect test, so there is a built in error.

Number Two, the condition of the test, If the test was administered now with that noise outside, the results can be questionable.

The motivation of a person being tested, his condition, his health, what you want to accomplish out of the test.

There are certain test situations, when [1628] you want to look very good, and there are certain test conditions that you don't want to look very good. The motivation of the person testing, what he is looking for, some answers are on the fence, and one can call it left or right, these are also important.

Those are some of the factors that need to be considered in interpreting IQ test and they have to be considered in order to explain that the testing is not a precise instrument.

Q Will social – or lack of education also effect IQ test?

A Yes. IQ test, althought it is called, or presented as a test of the nature of intelligence, it is really not, It is really, actually a measure of academic skills, what you have learned in school and formal training. So, if a person , educationally deprived, and alot of people are, so, because of family hardships, you have to go to shcool, I mean, quit school because of a personal situation, and that necessarily – that person would necessarily score lower than a person who is "fully and formally educated" but, that does not mean that a person who has no school is dumb.

[1629] Q A person that was uneducated and scored say in the mildly mentally retarded area, does that necessarily mean that the person was actually mildly mentally retarded?

A No.

Q Here, would you also want to look at the adaptive skills of what the person's ability to function in society is?

A Correct.

Q Reviewing the various records, on Johnny Paul Penry did you see where he had been administered a number of IQ tests over the years?

A Yes.

Q And, did those tests generally reflect – place him in the mildly mentally retarded range?

A Most of the test put him in the mild indications. He can go as high as borderline.

Q And, where would borderline be?

A It is between normal and mild.

Q And, that would be roughly on numbers, what would that be?

A In the seventies.

Q Okay. And, mildly retarded would normally be roughly in the sixties down to fifty-five or something like that?

[1630] A Yes.

Q I don't know, you have probably seen this exhibit here. Can you see that Doctor, all of it?

A Yes, I can.

Q Okay. This is a Defendant's exhibit that was introduced Friday, I believe where they wrote down some

of the test that they had seen in the records there. First of all, did you review some of these tests that are reflected?

A Yes, I have.

Q Okay. Can you tell the jury any of the significance of these tests? Is there anything about them that is particularly significant to you?

A Well, first the fluctuation is noticeable and so, one looks at why the fluctuations, and some of the factors that I have already explained the condition, the condition of the person to be tested, the condition of the person testing, have to be looked into, makes one wonder about the instrument used in this particular exhibit. So, the results of IQ testing, using instruments for children, and some are results from using instruments for adults. And, some of these results are [1631] estimates. In other words, the whole test was not given, but, only portions of them.

Q These test back in the 1960's, and up to and through even probably 1971, were those children test?

A Yes, the earlier ones were children's tests.

Q With respect to an adult, where they have a child IQ test, are those considered accurate in later years in determining that person's IQ level, necessarily?

A No. The IQ for adults should be used, measured by adult tests.

Q Okay. So, these test back in '65, UTMB, Calventon or '66, would they be necessarily indigative of his IQ as of – as an adult?

A No, they need to be considered these scores were once upon a time discovered, but they are of historical value.

Q Now, we move down here to about October, '73, and I believe this is Rusk State Hospital Examination. Are you familiar with that one?

A Yes.

Q Okay. Was that an adult test that was given to him at that time?

A Yes.

[1632] Q Okay. And, this 76 here was a very vague reference in one document that said 43, and then, he was under, it was actually under achieving in that one.

BY MR. SMITH:

Objection to Counse's characterization of the document, Your Honor.

BY MR. PRICE:

I am just repeating exactly –

BY THE COURT:

I believe he understands it is an estimate.

Q Under estimates in your opinion? Did you see any back-up for that test in those records or anything?

A Some of the courts that are mentioned in the test of the report, do not have the back-up. It referred to them, but, many of them do not have a raw data that we need to understand the picture completely.

Q In 1979 test are you familiar with that one?

A Yes.

Q Was that an adult test?

A Yes.

Q And, was that given by the Texas Rehabilitation [1633] Commission?

A Yes.

Q Is there anything significant about that 1979 test with respect to his IQ?

A The most striking observation is the performance IQ of '72. By performance, we mentioned intelligence is measured non-verbally. You don't have to use words or language, you use your hands, or you point to certain pictures, and he scored 72, which is the borderline range. It is higher than the mild mentally retarded range.

Q What about this Rusk State Hospital test, is there?

A The same observation, and that is his performance is 74 which is even higher than the 72.

Q Okay. This 1990 test, I believe the evidence has shown, was performed by Dr. J. Randall Price back in June, I believe, while this Defendant's trial was pending. Do you attach very much significance to that particular test?

A Well, the results are, again, places him back to the mild range. It must be pointed out that that test was necessarily after the legal proceedings have started, and one wonders as [1634] as to how much effort was placed

into this test, knowing that there are some gains that can be achieved by not doing as well. So, that testing, 1990, testing, has to be taken in the context of his legal predicament.

Q Based on your examination of the Defendant, as well as prior records that you have reviewed on the Defendant, both with respect to his prior social and educational and criminal history, as well as his prior medical and mental health history do you have an opinion as to the Defendant's current intellectual functioning capacity?

BY MR. SMITH:

Just for the record, I re-urge my prior objection, Your Honor.

BY THE COURT:

Objection is overruled.

A From the accounts that are in the record, and those presented in the exhibits, the Defendant's intellectual capacity is between mild mentally retarded range and borderline.

Q Now, does that necessarily mean in and of itself that he is mentally retarded?

A No, it does not.

[1635] Q Does that or does that not take into consideration his adaptive skills, does it?

A That's correct.

Q Have you reviewed all of his records from that standpoint, to make a determination as to his adaptive skills?

A Yes, I have.

Q And, do you feel that in that area, that he would be functioning in the mentally retarded area, not?

A No, he does not.

Q Does this Defendant have the ability to reason?

A Yes, he does.

Q Does he have the ability to learn?

A Yes, he does.

[1636] Q Does he know the difference between right and wrong?

BY MR. SMITH:

Objection, Your Honor, same objection.

BY THE COURT:

Overrule the objection.

A Yes, he does.

Q And, does he have the ability to control his actions?

A Yes, he does.

Q There has been some testimony, conflicting testimony, some testimony just the same, of possible child abuse where this Defendant was at an early age and have you, in reviewing his records, have you seen some indication of that or some allegations?

A There was some reference to child abuse.

Q Okay. Do you recall where those references of child abuse first really come out in these records?

A I think they emerged around the time that he was in Austin State Hospital.

Q Okay. And do you recall what he was in Austin State – how he got into Austin State Hospital what the circumstances were?

A I think he was sent there after he was charged with or convicted of arson.

BY MR. SMITH:

Move to strike the reference to the Conviction, Your Honor. There is no record of that.

BY THE COURT:

Okay. Sustain that Motion. Disregard the word after he was convicted of.

BY MR. SMITH:

[1637] Move for Mistrial.

BY THE COURT:

Motion for Mistrial is denied.

Q There were some charges of arson involved at that time, is that correct?

A Yes. I am just not sure whether that was one or the other.

Q And, this would have been in what year?

A I don't recall at this time.

Q Okay. But, at any rate, when he went to the Austin State Hospital.

A Yes.

Q Doctor, with respect to child abuse, just for a moment, assuming there was child abuse, has there ever been scientifically any causal relationship established by your profession between child abuse and specific criminal behavior and abuse.

A No, there is not.

Q There is a common understanding I think of most laymen, that, child abuse automatically leads to some sort of criminal behavior in the future, but, are there any surveys that back that up?

A No. The basic research that I referred to earlier [1638] in the testimony is at best, mixed. About a third of the studies show that there could be some relationship, but, the relationship is not caught in a trap, there is a difference between causation and correlation. Causation means child abuse directly caused a, or resulted in the violence. Correlation means that many people who are violent may have been abused as children, but there in no causation, it is correlation. About the same number of studies show that there is no correlation at all and then, another gorup of studies show that people who have been abused as children try their darndest to become model citizens, precisely because they know what it is to be abused.

Q Also, been some evidence, and you probably seen it in the Defendant's records, of some diagnosis or at least

indications of possible brain damage. Have you seen that?

A Yes. There were references to brain damage.

Q Okay. Could you just kind of explain to the jury what is brain damage?

A Brain damage is a physical defect the structure of the brain, in the brain itself.

[1640] Q And, is this the same thing as brain impairment?

A Brain impairment is a little more vague. I would suggest for our purposes here, brain damage refers to physical defect in the structure of the brain itself. Brain impairment may be seen as a defect in the brain's functioning the way the brain works.

Q Are there tests to determine the existence of brain damage?

A Yes.

Q Are there psychological tests?

A Yes, there are psychological tests as well as physical tests.

Q Okay. With regard to psychological tests, could you tell the jury some of those types of tests or a type of test?

A Well, there are individual tests, there are whole batteries of tests. One battery was administered to the Defendant, that is the Halstead-Raycon Battery. Another one would be the Lujon/Nebraska Neuro-Psychological Battery.

Q The Halstead Test, I believe the evidence has shown that Dr. Price also performed this Halstead Neuro-psychological Test. Are you familiar with that test?

[1640] A Yes.

Q And, have you administered it yourself?

A No.

Q Okay. Do you understand how it works?

A Yes. The test is not really one test but, a number of test. I have experienced various portions of it, but, for neuro-psychological test, I use other measures.

Q What do you use?

A The WAIS, the intelligence test, can be used to give some hints. Better result which is a drawing test, the Lujon/Nebraska is another battery. But, I use the Wechsler Memory Scale which measures different kinds of memories. It is a number of ways and finally you look at the person's functioning, better than any other test is how does the person function in real life. That is the best test of all.

Q That Halstead Test, is it designed to locate the area of specific area of the brain that may be damaged.

A It can be used that way.

Q The Halstead test given under circumstances of a Defendant such as Mr. Penry, this case, faced with capital murder charges and indeed, his jury [1641] is being selected during the time that the test is being adminstered, do you feel that that could could cause any problems with respect to the credibility of the test?

A Yes. This test and any other test, he motivation is questionable, the results have to be taken cautiously.

Q What is a MMPI Test?

A MMPI means, Mental Mulitfaceted Personality Inventory. It is a test that can measure different numbers of mental disorders or psycho-pathology.

Q In a situation where you were trying to ascertain the existence of brain damage, or at least the person's mental capacity, an Halstead Test was applied would you also want to apply a MMPI?

A Yes. The MMPI is part and parcel of the battery.

Q Okay. And would the MMPI, what would the MMPI tell you about the individual?

A The MMPI is a very useful test. It is mostly a very popular test. It can tell us a number of things. Number One it can tell us the test taking attitude of the person being tested. If a person is appearing honest, or if a person is what you call faking good meaning looking better [1642] than he is, or faking bad, which is looking worse than he is, then, it can measure a number of disorders, how obsessed the person is to traumatic problems, physical complex, it can tell us about the depression level, t can tell us about the person's acceptance of psycological pressure or problems.

These are people who take psychological problems, inter-personable problems, and treat them as such, people who like to blame it on ulcers and headaches, and neck aches, back aches so on and so forth, concerns us about whether a person has anti-social features. Anti-social meaning just unable to follow rules and regulations and

the ability to learn from punishment experiences and so on and so forth. It can tell us whether or not a person is suspicious or paranoid, is a person obsessed, excessive worried about other things; is a person schizophrenic, or shows some schizophrenic features, and finally is a person very hyper, and finally, that one last component, and this is, a person withdrawn or sociable. Many other applications include degree of substance abuse and many other measures, but those are [1643] the basic scales in the MMPI.

Q If you were giving a Halstead Test to determine the existence to brain damage and to determine the mental status of the Defendant would you thing that the MMPI would also be a necessity?

BY MR. SMITH:

Objection for lack of foundation Your Honor. The witness has never given a Halstead ever in his life.

BY THE COURT:

Overrule the objection, but, you restate the question.

Q You are familiar with giving the Halstead are you not?

A Yes.

Q Have you interpreted many of them in the past?

A The results, yes.

Q Are you familiar with the MMPI Test?

A Yes.

Q Have you given any of those?

A Yes. Yes, I give those routinely for psychological evaluations.

Q Irregardless of whether a Halstead Texas was given or not, would an MMPI be something that you feel like would be necessary to accurately [1644] get a complete picture of a person's mental status?

A It is a very important component, and very useful to me.

Q Okay. One of those things it would determine or give you some help in determine, is whether or not a person has an anti-social personality?

A Yes.

Q Also, understand that it would also benefit in determining whether a person was faking or not, and malingering?

A Yes.

Q Did Mr. Price give an MMPI?

A No.

Q Okay. Did he indicate on that portion of the Halstead whether he thought it was necessary or not?

A No, he just – no indication was that not applicable.

Q But you disagree, you feel that it would be applicable?

A If I were doing the evaluation, with or without the Halstead-Rayoon, the MMPI is a crucial document.

Q You mentioned that these are psychological tests [1645] to determine brain damage. Are there also medical tests that can be performed to determine the existence of brain damage?

A Yes.

Q Specifically, could you tell the jury some of those type tests?

A Well, the most common is the EEG, which measures again the function of the brain, the brain waves. There are normal brain waves and there are abnormal brain waves. When, you have the, for lack of a better term, x-rays of the brain using different techniques. The MRI uses magnification of the brain and the cat scan, which takes actual pictures of the brain.

Q The EEG, you said it measures the brain waves or electrical waves of the brain?

A Yes.

Q The CT, or the Cat Scan, does that actually show slices of the brain.

A Different angles of the brain, Yes, Sir.

Q Does one MRI show the entire brain in the three dimensional form?

A Yes.

Q Are these the most advanced type of test that [1646] exist right at this time?

A Yes, those are the State of the Art, other than autopsy.

Q Okay. And, have you seen reports from the University of Texas Medical Branch in Galveston where this person was given an EEG back in 1965?

A Yes.

Q And, what did that EEG show?

A That report that showed that he was normal.

Q EEG would not in and of itself, totally rule out brain damage would it?

A No.

Q That is just one tool that can be used, is that correct?

A Correct

Q Now, have you also seen tests that were performed on the Defendant again at the University of Texas Medical Branch in Galveston, within the last thirty to sixty days?

BY MR. SMITH:

Renew the prior objection to these tests, Your Honor.

BY THE COURT:

Alright. The objection is overruled. You can answer the question, Dr. Quijano.

[1647] A Yes, I have seen those results.

Q Was another EEG performed?

A Yes.

Q What did it show?

A The report indicates that EEG was normal.

Q Was the CT, or the Cat Scan performed?

A Yes, they were both performed and both reported normal.

Q And, the MRI?

A Yes, it was reported to be normal also.

Q Was he also given a genetic screen test of blood test that tested his chromosomes genetically?

A Yes, was given that in the sixties, and then again recently.

Q And, what did these tests reveal?

A Both showed that he was normal.

Q Physically, these tests showed no brain damage, would that be accurate?

A That's correct.

Q Based on the medical tests, as well as all of the other records that you have reviewed, Doctor, have you seen any evidence of actual brain damage?

A No.

Q Have you ever heard of brain damage to the entire [1648] cortex of the brain?

A Yes.

Q Do you see that possibility in this case?

A No, the person would be a vegetable.

Q Doctor, based on all of these records and your training and experience, what is your diagnostic impression with respect to the intellectual functioning of this Defendant at this time?

A Intellectually, he is between mild and borderline.

Q Would you, or do you have an opinion as to whether or not he is in fact, mentally retarded?

A Yes, I have an opinion.

Q What's your opinion?

A He is not mentally retarded.

Q And how did you arrive at that, even though, you just said that intellectually he is possibly mildly mentally retarded to borderline?

A Looking at the adaptive skills, the way that he has functioned and performed in a variety of settings, I judge that his adaptive skills, his survival skills are not in the retarded range.

Q With respect to his personality, have you formed any opinion as to any diagnosis in that area?

A Yes.

Q And, what is your opinion or diagnosis in that [1649] area?

A There is a pattern of grayness and the incident of rape, and the incident of anti-social behavior are also present. So, the other diagnostic impression would be anti-social personality disorder.

Q You mentioned rape. What does that mean?

A Well, there is another cateogory of mental disorders disorder that is called naraphilia, and a sub-category of that, so that he seems to have a problem in that area also.

Q Is that not necessarily a trait of the anti-social personality?

A No, not necessarily. It can be a part of it, but not a necessary part of it.

Q So, if I understand you correctly, your diagnosis would be that he is functioning intellectually within the mild mentally retarded to borderline area, is that correct?

A Yes.

Q But, in your opinion, because of his adaptive skills, from what you have seen throughout his records, that you feel that he is probably not actually, in fact, mentally retarded?

A That's correct.

[1650] Q But, he also suffers from an anti-social personality disorder?

BY MR. SMITH:

I would object to it, the witness has already testified and I would object.

BY THE COURT:

Overrule the objection.

Q That he also has an anti-social personality?

A Yes.

Q And, in addition to that, he has a sexual disorder that is evident by his raping conduct?

A Yes.

Q Talk about anti-social personality a little bit, Doctor. What is an anti-social personality?

A Anti-social personality has a number of components divided into two big chunks.

One is the behavior before sixteen, that there is a pattern of failure to follow rules and regulations before age sixteen as evidenced by inability to follow rules and regulations at home, in school, and frequent fighting, frequent violations of the rights of others, runaway, and involvement in the juvenile justice system.

[1651] After age eighteen, the pattern must continue and there should be evidence of, again, repeated violations of the law, disregard of the rights of others, the inability to learn from previous experience in the sense that one does not profit from the punishment or from being caught. There is an element of cold bloodiness without it, the person does not experience remorse and there are other measures of irresponsibility; inability to develop close personal relationships, inability to hold a job, the person quits his job before moving or before securing the next job. I mean, that, in itself, needs to be looked at.

Relating to the very richly person, gambling and different ways of endangering themselves, living on the edge, as it were. Those are some of the components, and if you see a pattern exsting that starts before age sixteen

and continues on, then, one could label a person anti-social personality disorder.

Q Your indicated one of the traits was that a person would not learn from the consequence of their act, is that correct?

A A person learns, they just – it gives an [1652] advantage, but, he does not learn from the punishment or from the cost.

Q Is it a common trait among habitual offenders, particularly violent offenders, that they have this personality trait, anti-social personality trait?

A Yes, the label is not given unless they have this repeated, and sometimes escalating offenses.

Q You mentioned cold bloodiness. One trait is that they show no remorse?

A No remorse, yes.

Q A person with an anti-social personality, that also had a history of violence, would you classify that person as a much dangerous individual?

A Yes.

Q Is there any cure for anti-social personality?

A No.

Q You mentioned sexual disorder or naraphilia. Are there different types of rapist? Categories of rapists?

A Yes, there are different types.

Q What are some of the types?

A One type is what you call the power rapist. This is a person who likes to dominate, just to over [1653] power another person, and in many cases, women are easily terminated, and to people who like to dominate and then, accomplish the domination by rape. There is the anger rapist, is a person that is very very angry and for some reson chooses to express that anger toward women; Or another type of rape, the rapes would be done on the same sex, and then, you have the saddist on top of the need to dominate, and express anger and they also inflict pain, and in the severe forms, obviously, rape, and murder.

Q A person that is a rapist, do they feel that the victim will comply with their demands initially or how do they feel?

A Yes. There is evidence and I have talked to a number of rapist, who believe that after the initial phase of coercion or threat of coercion, that the victim would fall for them.

Q Is a person that is classified with this type of sexual disorder, rapist, is that person a dangerous individual?

A Yes.

Q Is that a type of condition, one, that is likely [1654] to continue?

A Yes.

Q Based on your examination of all of these records and your prior training experience Doctor, do you have an opinion as to whether or not the Defendant in this case, Johnny Paul Penry, is dangerous?

A Yes, he is.

BY MR. SMITH:

Objection.

BY THE COURT:

Overrule the objection.

Q And, what was your opinion?

A I believe the Defendant, is dangerous.

Q With respect to his condition of being dangerous at this time, Doctor, have you – do you have an opinion as to whether or not he is likely to be dangerous and commit criminal acts of violence in the future?

A Yes, I do.

Q What is your opinion there?

A This opinion, intimation says that he is more likely to engage in continuing acts of violence in the future.

Q What do you base that on? If you could tell the [1655] jury some of the things.

A A number of things that I used to decide that, are help to decide the question.

One, is the presence or absence of disorders, mental disorders, in a person. In this particular case, there is evidence of anti-social personality disorder and there is evidence of sexual disorders paraphilia, the rapist. Those two things are very, very difficult to delete. So, that is one factor that I used.

Another one would be looking at the action of the person right after or right before the commission of the offense and there was some planning, thee was some forethought involved, That is more dangerous than an offense that is committed instantly or instantaneously, different from I was in a situation sort of sucked me into doing what I did. Planning and forethought is very dangerous. The actions of the person after the offense, that when a person was hurt, there was no attempt to help the person. If there was remorse, one would immediately try to help the person. There was none of that. In fact, you ought to look at not just the acts but the acts before and [1656] after, continuing on the line. You have evidence of a person that commits a crime like that, you have to look at whether there is a deliberate cover up. Now, do you go call the police and say I did it, or do you try to hide it, take your clothes away, or hide them or represent that you were somewhere else. There was some degree of cover up. Now, that is, to me, dangerous.

Then, you look at the condition of the person, a change, can a change be accomplished in a person and if the answer is yes, then, there is less likelihood, and if the answer is no, then, there is more likelihood. In this case I find that the person has not changed and will not change.

The condition is of the crime itself, was the crime, again, spontaneously or was it deliberate and if it was deliberate, so, what did you do anything about that. The crime was not specific to the circumstance, it originated not from the circumstances but, from inside him.

Those factors added together would lead me to believe that a person is more likely than [1657] not to become a continuing threat to society.

BY MR. PRICE:

Pass the witness.

BY THE COURT:

Okay. Lets recess for about ten minutes. Start back about ten-thirty. You are still not to discuss the case among yourselves or with anyone else.

REPORTER'S NOTE: (WHEREUPON AT 10:20 A.M. A TEN MINUTE RECESS WAS HELD.)

(JURY IN AT 10:45 A.M.)

BY THE COURT:

Dr. Quijano, you need to come back and take the witness stand.

BY MR. PRICE:

Judge, I need to ask Dr. Quijano one question that I neglected to ask him.

BY THE COURT:

Alright.

QUESTIONS BY MR. PRICE:

Q Dr. Quijano, the last question that I asked you pertained to the likelihood of this Defendant committing a criminal act of violence in the future, and you testified, to the various elements and basis that you arrived at the

opinion, and [1658] I want to specifically ask you, did you, in arriving at that opinion, rely upon your personal interview with the Defendant, back in May, to reach that opinion or conclusion?

A No, I did not.

Q Okay.

BY MR. PRICE:

I pass the witness.

BY THE COURT:

Mr. Smith?

CROSS EXAMINATION

QUESTIONS BY MR. SMITH:

Q Dr. Quijano, you expressed an opinion in this Courtroom didn't you that Johnny Penry is not mentally retarded?

A From the data that I have, my opinion is that he is not mentally retarded.

Q And, you have been under oath in this proceeding before, haven't you?

A Yes.

Q And, you did not express that opinion the last time that you testified?

A I think I did.

Q That you gave that opinion the last time, that he was not mentally retarded?

[1659] A No.

Q You said that he was mild to borderline, didn't you?

A The intellectual functioning is in the mild/borderline range

Q That is what you said last time? And, you didn't say anything about his not being mentally retarded, did you?

A I was not asked, as I recall. I was not asked the question point blank.

Q You just let it go, intellectual function is mild borderline, you didn't have to mention that in your opinion, he wasn't mentally retarded, right?

A I was not asked and I did not answer.

Q Are you being cute, Doctor?

A I am not being cute, in the professional sense or in a scientific sense. I answer the questions that are asked to me.

Q When did you come up with the idea that you could make him not mentally retarded, by adding any adaptive behavior?

A That is required by State law.

Q But, you didn't mention it when you testified before?

A No, I ws not asked that question.

[1660] Q And, you recall, and you were called as a witness by Mr. Price, weren't you the last time?

A Yes, I was.

Q Did you discuss with him, did he even ask that question, that you had a flat opinion that the man was not mentally retarded?

A I discussed with him the components of mental retardation.

Q I just want to know, Doctor, whether you really thought last time that you were here that he wasn't mentally retarded? You never suggested that Mr. Price asked you the question?

A Did I think he was not mentally retarded? According to the criteria set forth, in the State law, is that he is not mentally retarded.

Q I am asking you the last time that you testified I am asking you if you had the same opinion then as you have now?

A Yes, I have, I had.

Q And, you are seriously telling us that it just never happened to come up the last time, correct?

A I was examined by two lawyers and the question never came up.

Q One of those lawyers was Mr. Joe Price, wasn't it?

[1661] A That's correct.

Q And, that question just never happened to come up when you were asked, right?

A I was not asked the question.

Q But, now, you are saying that even though, intellectually he is mild to borderline, he is not mentally retarded, because he adapted so well, is that your testimony?

A That his behavior and adaptive skills are not retarded, and thus, does not mean that he thinks less of the definition of mental retardation according to State law.

Q Are you telling this jury that Johnny Penry, is a wonderful example of how a mentally retarded person can adapt to society?

A No, he is not mentally retarded, so, he cannot be used as an example.

Q Are you telling this jury that Johnny Paul Penry is a wonderful example of how one of low intellectual function could adapt to society?

A No, he is not a wonderful example. He is an example.

Q Oh, he's not? Let me dwell for a minute on this mildly retarded borderline. Do you know a man name Fred Fason?

[1662] A No, I don't.

Q Never heard of him?

A Never.

Q He testified as an expert witness for the State in this case. You learning this for the first time?

A Oh, Fason? Yes, I mean, I have heard of him.

Q He said, that Johnny is in a range of mentally retarded to dull/normal. Lets say, that intellectually that you don't even go asfaras that, do you?

A Dull/normal is the eighties, and he is only up to the seventies, so, he is from the criteria, only a borderline.

Q And, if Dr. Fason said dull/normal, you would disagree, correct?

A From the figures that are available to me.

Q From the figures that are available to you, you would disagree, correct?

A Yes.

Q Now, those figures are available to you, those are the ones that are on the Exhibit Fourteen, written in such beautiful hand-writing, right?

A Yes.

Q And, you study as much as you have available to you about all of these tests, right?

[1663] A Yes.

Q And, do you have an opinion, Sir, as to any one of these tests, that is valid or is not valid?

A Each test has the varying degrees of validity.

Q Well, is there any test on there that you can tell this jury in your opinion as a scientist, is invalid?

A I cannot off-hand declare any of them invalid.

Q I'm not saying off-hand. You have been studying them for a while before you came here, haven't you?

A Yes, but, I was not there when those tests were administered.

Q And, without being there when they were administered you cannot say that they were either valid or invalid, correct?

A We can only be cautious in interpreting this.

Q Is a cautious way to interpret these tests, is throw out every result? Is that considered the cautious way to interpret it?

A No, the cautious way is to say the testing can go either higher or lower depending upon the Defendant's motivation at the point that the test was administered.

Q Higher or lower?

[1664] A Yes.

Q If Dr. Fason said they could only go lower, then, he would be wrong, wouldn't he, or if he said, they could only go higher, he would be wrong?

A Correct. They can go either way.

Q You did not personally give him an IQ test, did you?

A No, I did not.

Q Do you have an opinion on what Johnny Penry's IQ is today?

A From all of the test put together, he would be between mild and borderline.

Q Well, some of the tests are below mild, aren't they?

A Well, we are looking at his upper limits and not his lower limits. We are not trying to discover what his floor is, we are trying to discover what his ceiling is.

Q What is the highest overall IQ he ever tested at?

A 74.

Q Overall?

A Oh, you mean, full scale?

Q Full scale.

A On full scale, 63.

[1665] Q What is the lowest?

A 43.

Q 43. If you count this one, or if you don't count that one?

A It is 50.

Q Well, Doctor, less than 50, isn't it?

A Well, yes, it says less than 50.

Q What is 50, mild or moderate?

A Moderate.

Q You know Randy Price, don't you?

A Who?

Q Randy Price?

A Oh, Randy, yes.

Q And, he is a neuro-psychologist, isn't he?

A He is a clinical psychologist, yes.

Q Is he something called a neuro-psychologist?

A I am not aware that he is a neuro-psychologist.

Q You know him to be an honest, competent doctor, don't you?

A Yes.

Q And, if he said he was a neuro-psychologist, you would take his word for it?

A Yes.

Q And, if – and you know that he gave an IQ test to Johnny Penry a few months ago, right?

[1666] A Yes.

Q And, he was not – and you have not given Johnny Penry an IQ test?

A That's correct.

Q And, if Randy Price told you that these were his scores on an IQ test a few months ago, and that Randy Price had given the test, do you think that would be entitled to considerable weight, wouldn't you?

A No.

Q Why not?

A Because of the factor of malingering introduced by legal involvement, and I would not question that because Randy did it, I would question that done by anybody. Once the legal predicament is introduced, you have to view it very cautiously.

Q And, you said, malinering. That is another word for faking, isn't it?

A No, not necessarily. Malingering is when you not perform well, or perform worse or better for a secondary gain. In other words, you have some physical advantage, or some advantage to get, and faking sometimes you don't get anything out of it.

Q Is it fair to say that you are a very careful [1667] man about the works that you use?

A These are technical terms that you ought to be very careful with.

Q And, you are correct.

A Yes.

Q Okay. But, whether you call it malingering or faking, he is doing it on purpose, right?

A Faking sometimes is not done on purpose.

Q Okay. Okay. Malinger. By malinger, you mean doing bad on purpose, fair enough?

A Yes, yes.

Q Okay. And, are there ways to check on test whether someone is doing back on purpose?

A We can do our best, but, in the end, I don't think so. We, can have indirect measures, yes, that's correct.

Q Are you an expert in that particular field?

A I think so.

Q And, in the field of detecting malingering?

A Yes. I do that routinely in my applications.

Q And, so, you are familiar for example, with the Rayford fifteen item, then?

A That is one of the measures.

Q What is the Rayford fifteen item test?

A I don't use the test.

[1668] Q I just asked you what it was. I didn't ask you whether you used it. What is it?

A I am not familiar with that test. It is one of those things that measures malingering, but, I don't use it. There are better measures.

Q Doctor, I asked you a minute ago, are you familiar with the Rayford fifteen item, and the answer to that question is no, isn't it?

A I am not familiar with the test.

Q Is there any reason that you couldn't tell me that the first time that I asked the question? Is there a reason?

A I am not familiar with the test. I don't use it.

Q Do you know whether it is a particularly useful device in a Halstead Test, to see if a man is malingering or faking?

A That, I am not familiar with, either. I can say that there is other measures of malingering.

Q You are not familiar with it, but, you know better measures, right?

A Yes.

Q How can you say that they are better if you don't know what the other test is?

A Because there are more obvious measures for [1669] malingering than that test.

Q Tell us the obvious?

A Like when you – like when your life is at stake.

Q You say when a man's life is at stake, and it is malingering, and that is all that you need to know?

A No. When a person's gain is obvious, then, the guidelines say that you must be very cautious, because malingering creeps in, very obvious circumstances, when the person is not subjective as you would want them to be.

Q Doctor, no one disagrees that when a man's life is at stake, to be very cautious, but, you, right now, what do you do to be cautious? How do you test whether he is malingering or not?

A There are measures that you can use. Direct observation, for example.

Q Tell me two or three measures that you can use.

A One good measure is the MMPI, which was not administered. An MMPI would have told us whether it was a deliberate effort to test down, whether it was a deliberate effort to test up. You would have that. It also tells us whether he [1670] has anti-social features and anti-social, not normally to tell the truth. There are other measures, and that is direct observation. The way the questions are answered. The obvious contradictions in doing the examination process.

Q So, that if Randy Price told you that he had given four hours of test, and that he looked carefully for obvious contradictions and hadn't found any, would that indicate to you that maybe the man was not malingering?

A From his report, you have to, of course, give value to his impression, but, one also, has to give value to the overall instruction.

Q Doctor, try to address my question. If Randy Price said to you that he had given four hours of test, and that he had checked carfully to see if there were any inconsistencies in various parts of the test, and he had found it to be consistent all the way through, would that indicate to you that maybe the man was not malingering?

A Maybe, but, I have to question the mythology

Q What mythology do you use to check for malingering?

A I have to question – the point that I am trying to make is this –

[1671] Q Doctor, I didn't ask you the point that you are trying to make. Mr. Price can ask you point he is trying to make.

BY MR. PRICE:

He has got a right to explain his answer, Your Honor.

BY MR. SMITH:

I think I am entitled to ask the question.

BY THE COURT:

Go ahead and ask your question.

BY MR. PRICE:

He is entitled to answer.

BY THE COURT:

You can explain your answer, but, answer his question, Doctor.

Q You say you questioned Dr. Price's mythology the way that he tested for malingering, is that what you are saying here?

A No, I did not question what he did. I questioned what he did not do.

Q What did he not do, the MMPI, right?

A The MMPI. I do not see any consideration of the guidelines which tells us that the social, the predicament a person is in, has to be considered.

[1672] Q You say you have no evidence that Randy Price considered that at all, right?

A I have no evidence that he considered that because if he did, he would not be as categorical in his statement as he was.

Q So, you are telling this jury, that Randy Price didn't consider at all, the possibility of malingering, is that your opinion?

A Yes, because if he did, consider what he ought to consider, then, he would have been more cautious in saying that there is a possibility he did, or there is a possibility that he did not. In the end, he got an E or I to definitely determine a malingering, only the Defendant

can say that, but, the only thing is, there are guidelines that need to go by and one of the warnings that we are given to consider the circumstances of the person being tested.

Q Let me suggest to you some ways you can be cautious, okay? One way you can be cautious is you see what people usually – which parts of the test people usually like to malinger on, how he scores on it. Did you ever try that?

A Yes.

[1673] Q Do you know whether Randy Price did it this time?

A I don't know what Randy did.

Q I take it you haven't read or heard a summary of his testimony, have you?

A No, I haven't.

Q Another way you might test, you give him a chance to fake or malinger, to say I am going to give you a real hard test, but, actually, it is an easy one, and if he flunks it, that is a sign that he is faking, and if he does well that is a sign that he is not, does that make sense to you?

A Sometimes.

Q In fact, you have to be pretty smart to fake it convicingly on a four hour Halstead don't you, Doctor?

A If you did, yes, be very smart.

Q If a man faked a four hour Halstead, he would be very smart, right?

A Yes.

Q Do you have an opinion as to whether Johnny Penry is very smart?

A He is academically not very smart. He is street wise smart.

[1674] Q He is street wise smart?

A Yes.

Q And, is street wise smart a kind of skill that you need to fake on a Halstead?

A No it is a kind of skill you need to –

Q No, no, Doctor. Try my question, please. Is street wise smart the kind of smart that you need to fake the Halstead, yes or no?

A Yes.

Q It is?

A Yes.

Q So, that street wise smart person will know for example, that he had better do well on the finger tapping, but not do so well on the simulated drawing, street wise person knows that?

A Even simpler than that. Simply to say I don't know, simply to say I can't go on, simply to say I can do that. Who is there among us, no matter how good a psychologist is, to say that I don't know means I don't know, or I don't know, means I don't want to do it?

Q Very good point, Doctor. Is it true that when people are trying to malinger on a test, that the most

obvious way to do it is to say I can't do it, I don't know the answer, right?

[1675] A That is one way.

Q If Randy Price were to tell you that he tested this man four hours and not once did he give up on a single test and say he couldn't do it, would that indicate to you anything about his malingering?

A That statement is impossible to make, because how can I or Randy or anybody determine when he "Gives Up" and when he "Does Not Give Up"? Only he knows that.

Q When you determine a guy says I can't do it, can you say that?

A If he says I don't know or I don't want to, or I can't do it, that is one way to measure that variable.

Q And, if this particular Defendant never once said, I don't know, or I can't do it, what would that indicate to you?

A Not much.

Q The MMPI. That requires a sixth grade reading level doesn't it, Doctor?

A If it is read by the person being tested.

Q And, if it is read aloud of course that can achieve the results can't it?

A Not particularly to invalidate the test.

Q You have never actually given a Halstead?

[1676] A No.

Q But, you know what it is?

A Yes.

Q Well, list for us the test that make up the Halstead?

A I am not familiar with the specifics.

Q That's what you meant when you said you knew what a Halstead was?

A I know that the Halstead is a neuro-psychological battery made up of tests. Many of the tests, I am familiar. Some I am not familiar with. I do not use the Halstead, I use other measures.

Q The Halstead is widely recognized as a valid measure of brain damage, isn't it?

A Yes, is a very good test.

Q But, if I asked you to give me one right now you wouldn't know how, would you?

A No. If I had the instruments I could do it.

Q Well, I thought you couldn't even name the test that made it up?

A There is an instruction booklet with the Halstead test.

Q You could do it if you had the instruction book, right?

A Well, in many of those test, you have to read [1677] instructions, very basic. You cannot administer –

there are some tests without verbatim instruction. You have to have the instructions with you.

Q Let me just ask, have you ever read those instructions?

A During my training, but, I have not used them professionally.

Q Let me just test your recollection. How many tests in the Halstead?

A I don't know the exact number, ten or eleven.

Q How many can you name?

A The way – the MMPI, finger tapping, there are steps, I can tell you what we ought to measure but, not how to measure them.

Q I just asked how many you can name. You answered the question, Sir. Now, are you saying, Sir, that everyone who is below sub-average intelligence is mentally retarded?

A No.

Q You say that sub-average intelligence is one degree. You don't mean just sub-average, do you?

A You have the sub-average intelligence, plus [1678] adaptive skills.

Q Alright. Lets put aside the wonderful adaptive skills for a moment, and then, talk about intelligence. Okay? Are you saying that you can be mentally retarded in terms of intelligence just by the term, sub-average?

A Yes.

Q In other words, if my intelligence is below average, then, asfaras intelligence is concerned, I am mentally retarded?

A Yes, that is why it is called mild mentally retarded, and functioning at borderline, whatever level you are.

Q So, all of those types of people in the world are retarded in terms of intellect, right?

A I don't know where you got that statistic from.

Q You were using the word average differently. I have in mind a simple minded person, that if there are a hundred people in a room, fifty would be below average and fifty would be above. Is that what you mean by average?

A No, you are talking about a median.

Q What do you mean sub-average intelligence?

[1679] A Sub-average is 69 or below.

Q What percentage of the people in this country, or what you call sub-average intelligence?

A About one percent.

Q So, when you say sub-average, you mean that ninety of a hundred people are smarter than I am, if I am sub-average, right?

A Ninety-nine percent are smarter than you are? No, that's not what we are saying.

Q Okay. Lets try it again. One percent is mentally retarded, right?

A Yes.

Q Ninety-nine percent are not mentally retarded, right?

A The incident, –

Q Wait a minute, is that right or wrong?

A It is not – it is raising – you are stating it wrongly. The incident or mental retardation is one percent.

Q What is the incidence of not being mentally retarded?

A There is a difference between incident, which is the number of people that we have, and the number of people that we have tested, one percent appears to be mentally retarded, but, since we [1680] have not tested everbody in the world, we don't know the true count.

Q So, lets just stick to the ones that we have tested.

A Okay. One percent of those are mentally retarded.

Q Ninety-nine percent are not, right?

A Correct.

Q Do you have any reason to think that the rest of the world is different?

A Yes.

Q Well, okay. What about the rest of the world? The rest of the world, more than one percent or less than one percent are mentally retarded?

A We don't know, becuase that is a projection that we have not made.

Q The reason that you do these testings, is to try to figure out how common mental retardation is?

A Right. You try to make an educated guess.

Q And, your educated guess is one percent, right?

A Yes.

Q Okay. And, your educated guess, is that ninety-nine percent are not retarded, right?

A Yes.

Q Okay. And, so, that means, if I am mentally [1681] retarded, you are Dr. Quijano, your best educated guess, that ninety-nine percent of the people are smarter than I, right?

A That is a gross statement.

Q Now, – -

A Yes.

Q So, now, to be mildly mentally retarded, is a very serious impairment, is it not?

A No.

Q You wouldn't bother if you had a child that was mildly mentally retarded?

A I would bother, but, it is not a very serious impairment.

Q Well, would it bother you mildly or seriously?

A It would bother me seriously, but, the impairment it bothers emotional reaction to my child's problem would be severe, but, the child's problem is not severe.

Q What do you mean when you say that the problem of a mentally retarded person is not severe?

A The mild mentally retarded person's problem is not as severe, for example, as an anti-social personality disorder.

Q There are worse things than mental retardation, is that correct?

[1682] A That's correct.

Q Is severe child abuse one of them?

A Is severe child abuse worse than mental retardation? Yes.

Q And, if you get both, it is really quite a piece of bad lock, isn't it?

A Yes.

Q And, we don't know, what causes mental retardation, do we?

A Not specifically.

Q And, you listed a number of causes when you were testifying for Mr. Price, right?

A Yes, the possibility.

Q You didn't happen to mention brain impairment, Is that one of the possibilities?

A Brain impairment is caused by infection, trauma, some of the factors that I entered.

Q Brain impairment, caused by trauma, like a vicious beating around the head, that is one possibility?

A Not necessarily. You could be beat in the head without damaging the brain.

Q Could be, in fact, it would take a tremendous blow on the head to actually damage the brain, wouldn't it?

[1683] A That's correct.

Q And, such a blow, it would be unlike that, a mother would ever give that blow to a child, right?

A Or anybody for that matter.

Q But, it would be physically possible, I suppose, for a strong woman in a frenzy with a little child to give such a blow?

A It is possible.

Q Now, it is true, isn't it true that mentally retarded people are able to reason and plan and think things through less well than normal people?

A Yes.

Q And, it is true, that, that can be frustrating for mentally retarded people?

A Yes.

Q And, it is true sometimes more frustrating in a way if you are mildly retarded or borderline, isn't it? You see what I am getting at?

A No, I don't.

Q Sometimes it is a problem to be smart enough to understand how dumb you are, isn't it?

A Yes.

Q So that if you are bright enough to realize that [1684] ninety-nine percent of the people are smarter, that is particularly frustrating?

A Yes.

Q And, that kind of frustration, without saying that it is an excuse, or accounts for criminal conduct, is that kind of a frustration sometimes a contributing factor to criminal competence?

A It may or may not be.

Q Sometimes it is and sometimes the answer is yes?

A Sometimes the answer is no.

Q And, sometimes, one more time, is the answer sometimes yes?

A Sometimes yes, sometimes no.

Q It is also, a part from the frustration just not thinking things through, can itself sometimes contribute to criminal conduct, sometimes yes, sometimes no, right?

A In the anti-social, not thinking things through, is common, because – put it that way.

Q All I asked you was mentally retarded people, well, they have a problem thinking things through, don't they?

A Yes.

Q And, that problem, the question is, that problem sometimes contributes to criminal conduct? Is [1685] the answer sometimes yes, sometimes no?

A Yes.

Q It is also true, isn't it, that mentally retarded people like to appear normal?

A And, normal people, like to appear normal.

Q But, is it not a striking characteristic of mentally retarded people that they like to appear normal?

A Some of them do, and you know, the point is we cannot make categorical statements, that apply to everybody.

Q But, you are a little more argumentative today than you were when you testified a few months ago, aren't you?

A I respond to the circumstances.

Q Fair enough, Doctor. Let me ask if you testified this way when you were under oath on the 14th or 15th day of May this year.

"Question: Is it a known characteristic of mentally retarded people, even though it is a mild range, to have the desire to appear normal?" On Page 40. "Answer: That is true in most people in general, including, mentally retarded people, but, you don't have to be retarded to look better than you really are. That is what we do, that [1686] is why we wear clothing. Question: But, it is a striking characteristic that a lot of lay people aren't aware of about the mentally retarded, isn't it? Answer: Yes."

You gave that testimony, right

A Yes.

Q And, it was true, correct?

A Yes.

Q And, is it also true that mentally retarded people, generally respond to authority figures the way authority figures want them to respond?

A Generally, but it can go either way, again.

Q Now, you are very careful with words, Doctor, and I notice that when you mention the subject of anti-social personality disorder, you use the word diagnostic impression. You chose those words carefully, didn't you?

A Yes.

Q That is because you haven't actually made a diagnosis have you?

A That term, clinical impression, is a lead-way to the imprefection of our system, and although, knowing what we know, we arrive at that conclusion, we always, always, as a scientist, and as a professional, give some lead-way that there could [1687] be an error.

Q So, you are testifying that you never make a diagnosis, you just have a diagnostic impression?

A That's correct.

Q At the Competency Trial you did use the word diagnosis, you said you hadn't made one, correct?

A I, as a practice, just make diagnostic impressions. I am more humble than others, I guess.

Q Well, did you give the following testimony a couple of months ago? "Question: Do you really believe

Mr. Penry is anti-social personality? Answer: I have not definitely diagnosed him, I am going by previous evaluation." Did you give that testimony?

A Yes.

Q And, you said that, for anti-social personality disorder diagnosis, you have to have a lot of misconduct before the age of sixteen, right?

A Yes.

Q And, is that based on the diagnostic and statistical manual of mental disorders?

A Yes.

Q And, is this called the DSM3?

A Yes.

Q Did you check on the DSM3 before you come here [1688] today?

A Sure.

Q Would you want to check again and see if it says, sixteen or fifteen? Try Page 344.

A 344. Fifteen.

Q Fifteen. Okay. And, you relied on things in the record you saw that suggests that Johnny Penry was doing significant anti-social things before fifteen, correct?

A Yes.

Q And, do you know, Doctor, that all of that evidence came directly or indirectly from his mother?

A Some are from the school, some are from the institutions that he was in, it came from various sources.

Q But, when, the school just wants to know about a kid, who do they usually ask in your experience, Doctor?

A Their teachers, their classmates, their parents police records.

Q In this case, you don't have the slightest idea where this information came from that you saw in the records, do you?

A Yes, I have, some pretty good ideas, where they [1689] came from.

Q You don't think any of it came from his mother?

A No, I did not say that. I said some of the information came from various sources.

Q Tell me, which came from his mother and which didn't?

A Oh, the observations in school that he was taking sharpened pencils and poking girls with them.

Q Okay. Take that one out, please. Take that one out. have you got it there? Out of your folder. Have you got it there?

A I have to look for it. You want me to identify each time I see one?

Q Why don't you show me where you got that particular item, sharpened pencils?

A I haven't found it yet.

Q You haven't found it yet?

A No.

Q You keep on looking, then. Take your time. Can I give you a hint, Doctor? Try diagnostic evaluation dated July 29, 1965, by Dr. Noel Cowan, do you have that there?

A Is that UTMB?

Q I think so.

[1690] A Okay.

Q Got it there?

A Yes.

Q The item that you referred to is on the second page, isn't it, "Classroom, newly sharpened pencil."Right there.

A Dr. Cowan, right.

Q No, Dr. Noel Cowan. Let me show you a piece of paper. Looks like this.

A UTMB. I don't know if I can find it.

Q Look at my copy, okay?

BY MR. SMITH:

May I approach, Your Honor?

BY THE COURT:

Yes, Sir.

Q See this before?

BY MR. PRICE:

What are you showing him, Counsel?

A It doesn't look familiar.

Q Has almost the exact words that you used in your testimony, doesn't it, "Stabbing girls in the classroom with a newly sharpened pencil?"

A I read it from a school report.

Q You did? Well, who is it? Were you shown the UTMB file or not?

[1691] A Yes.

Q Doctor, do me a favor. Look at my copy. Who are these? What does it say, informant, for UTMB report?

A Mrs. Shirley Penry.

Q Read the whole sentence please.

A "The informant was Mrs. John Shirley Penry, the mother."

Q Thank you. And, do you know whether his mother was mentally ill?

A She showed episodes from the records.

Q What records have you seen?

A Social history in a different institution.

Q Did you see the records of her hospitalization when Johnny was born?

A There was reference to the post-partum psychosis.

Q Did you see the hospital records from that post-partum psychosis?

A I don't think so.

Q Do you know whether or not she is a paranoid shizophrenic?

A No, only that she had a serious episode of mental illness.

Q Do you know if it shows violent episodes?

A There were references to that, yes.

[1692] Q Do you know whether she hated her child, Johnny?

A No, I do not know that for a fact.

Q You know whether she ever lied about him?

A I don't know whether she lied or not.

Q Do you have an opinion as to whether she is a reliable informant?

A No, I have no opinions.

Q Actually, when you did see Johnny Penry, you told him at that time, that you thought that he was a good person, even though he was accused of having been very bad, is that correct?

A Yes.

Q And, that is because as a psychologist and a christian, you sincerely believe that all of us are good, correct?

A Yes.

Q Are you an expert in determining whether children have been abused or not?

A Well, the abuse either happened or it didn't happen. You don't need an expert for that.

Q That is what the jury is for, right?

A Correct.

Q But, you said the first evidence was when he got in trouble when he was around seventeen, right?

[1693] A That is the first mention in the record.

Q Are you sure?

A No, I am not sure, but, that is what struck me when I was viewing the records.

Q And, you told the jury that, on your direct examination, did you tell them that you weren't sure?

A No, I didn't tell them I wasn't sure, because I was not asked.

Q Should they take all of your testimony that way, that if we don't ask you whether you are sure, we are going to assume that you are not sure?

A No, not necessarily. They should take my testimony as not sure if I am asked, and I say so.

Q Okay. So, we had better be careful to ask you the question if we want to know, right?

A Yes, and I would answer all questions.

Q Can you find an intake summary from the Mexia State School, dated July 16, 1968?

A Mexia. Okay. I got Mexia. Is that by the student case___worker?

Q Yes.

A Okay.

[1694] Q And, that is one of the documents that you relied on?

A Yes.

Q Read the last paragraph loud and clear, please?

A "A few days after admission, when subject's hair was cut, it was discovered that he had many more scars over his head. When asked how he received the scars, he said, that they were from cuts made by a large belt buckle which his mother used when whipping him."

Q Did you miss that when you went through the records?

A No.

Q That is before what you say was the first evidence of child abuse, isn't it?

A This is history. This is his report that this is the way that it happened.

Q You don't consider evidence of child abuse when a child tells this student case-worker he is abused?

A No, I don't take as truth everything that I read.

Q Only if it helps the party that called?

A No, only if it is selected for truth.

Q Isn't that what we have a jury for?

[1695] A That's correct.

Q Let me ask you to assume that there was some abuse that went on and I am going to give you some hypothetical facts and ask whether in your opinion that is abuse, okay? Assume a nine month old baby, sitting in a high chair is hit very hard with his mother's fist. Is that abuse?

A Yes.

Q Assume that a two year old child is scolded on purpose in the sink, been scarred. Is that abuse?

A Yes.

Q Assume that he is subjected to daily beatings with such things as extension cords and switches from a very early age, Is that abuse?

A Yes.

Q Assume he is locked in a room without access to toilet facilities and that is done clearly out of meanness. Is that abuse?

A Yes.

Q Assume that he is made to drink his own urine as punishment. Is that abuse?

A Yes.

Q Assume that he is made when he messed in his [1696] pants, he is made to eat it out of his pants, as punishment. Is that abuse?

A Yes.

Q Assume that when he get toys, his mother breaks them over his head. Is that abuse.

A Yes.

Q Assume that his mother's nickname for him is a Little Bastard, and that, it is said with hate. Is that a form of abuse?

A Yes.

Q Assume that his mother holds him under water in a bathtub, and screams that I am going to drown you, you little bastard. Is that abuse?

A Yes.

Q Assume that his mother takes after him with a butcher knife threatening to cut his penis off and he panics, terrifies the child, and thinks that she is really going to do it, and it takes the father to stop her. Is that abuse?

A Yes.

Q And, if you assume that this is true, and I realize you don't have any opinion one way or the other whether all of that is true, do you?

A Well, finish the question.

[1697] Q Do you have any opinion one way or the other on whether the things that I just said, my assumptions were true?

A No.

Q But, if you assumed that it was true then, that is one of the more appalling cases of child abuse that you have heard?

A Yes.

Q And, are you seriously saying that child abuse of that kind has nothing to do with later criminal acts?

A No, no, I did not say nothing. There is no causal effect. There are many people who are subjected to worse abuses who do not become rapist and murderers. There is no direct linkage. In fact, in many cases, people who are subjected to that kind of abuse go out of their way to do the opposite, and I am one of those.

Q I wouldn't ask you if you hadn't volunteered it, but, you had a very painful childhood, yourself?

A Yes.

Q Your father suffered from alcoholism?

A Yes.

Q And, don't answer this unless you want to Doctor, but, if you assume that everything I gave you as [1698] an assumption a little while ago, is absolutely true, did Johnny Penry have it even harder than you did?

A A close call.

Q And, you really went through stuff, I think?

A Yes. In fact, there are – I get – I can say that I had a worse life than him, in the end.

Q And, did you have any loving parents make it up to you?

A I think he was a loving father.

Q No, no, I am not asking you, Sir, I don't want to ask about your childhood, but, you volunteered. Did you have a loving parent?

A Yes.

Q Who was that?

A My father.

Q And loving mother?

A Yes.

Q And, I don't dispute all that you went through, but, that helped didn't it, those loving parents, they helped?

A They helped in two senses. The loving portion helped and the abuses made me very determined not to become like him.

Q If you assumed that Johnny Penry's mother hated [1699] him from the moment she saw him, that is lackened of abuse, you didn't have, isn't it?

A That's correct.

Q Are you really saying that, Doctor, that – you know about the horrible crime that occurred, don't you?

A You mean this offense?

Q This offense.

A Yes.

Q Diane Koch?

A Yes.

Q And, you really think those things would have happened exactly the same way if Johnny Penry had a loving mother like yours and mine?

A I could not say it wouldn't have happened, but, I can say this, because of his abuse that does not explain what happened.

Q Maybe we are shouting at each other, or I am shouting, but, you are not shouting back. Maybe we really agree. It is not an excuse, is it?

A Correct.

Q Had something to do with it?

A Correct.

Q And, over coming you terrible treatment, it was not easy for you, was it?

[1700] A No.

Q Even though, you did have two loving parents?

A That's correct.

Q And, you think it might have been harder if you were mentally retarded?

A Definitely.

BY MR. SMITH:

Pass the witness, Your Honor.

REDIRECT EXAMINATION

QUESTION BY MR. PRICE:

Q Dr. Quijano, were you furnished records from the Austin State Hospital?

A Yes.

Q I want to show you – you may can find in your records here, the intake summary, actually from Harris County, but, went to Austin State Hospital?

A Yes.

Q You see who the informants here are?

A The informants, Patsy Fuller, Lucille Anderson and Trudy Penry.

Q Okay. Doctor, I am going to ask you to assume that the evidence shows the Patsy Fuller and Lucille Anderson are the sisters of this Defendant's father. I am going to direct your attention over to the third page, second sentence [1701] in the last paragraph of that report. Would you read that to the jury, please?

A "He was hostile, he was quite hostile and aggressive with his peers, previously cutting and poking them with scissors."

Q And, that was based on information from Mrs. Fuller and Mrs. Anderson?

A That's correct.

Q And, that was not his mother, is that correct?

A That is correct.

Q And, didn't you review those records, Doctor?

A Yes.

Q And, Mr. Smith asked you about your personal situation, and I will be quite honest with you, I was not aware of that; but, he asked about whether or not it would be harder for you to have made the adjustment that you did; if you had been mentally retarded, and obviously, that would pose a problem in becoming a psychologist, the degrees that you have got, if you had been mentally retarded, that would keep you from, – oh, interfere with that, would it not?

A Correct.

Q Likewise, Doctor, if you had had a anti-social personality, or what use to be referred to as [1702] a psycho-path, would that have caused you some problems, also?

A That would be a more severe impediment than the mild retardation.

Q It would also be more indigitive of aggressive, violent behavior than mental retardation?

A Yes, that's correct.

BY MR. PRICE:

Nothing further.

BY MR. SMITH:

Nothing further, Your Honor.

BY THE COURT:

Okay. You can step-down, Dr. Quijano. Okay. Lets recess early for lunch and then take the next witness. It is twenty minutes to twelve. You got a nother witness don't you Mr. Price?

BY MR. PRICE:

Yes, Sir.

BY THE COURT:

Okay. Be more than fifteen or twenty minutes?

BY MR. PRICE:

Yes, Sir.

BY THE COURT:

* * *

(9)

Supreme Court, U.S.
FILED
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No. 00-6677

In The

Supreme Court of the United States

JOHNNY PAUL PENRY,

Petitioner,

v.

GARY L. JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX
VOLUME III, PAGES 531 TO 794

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CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

* * *

[50:1704] STANTON SAMENOW

called as a witness by the State, having first been duly sworn to tell the truth, testified on his oath as follows:

DIRECT EXAMINATION

QUESTIONS BY MR. PRICE:

Q Would you state your name for the jury, please, Sir?

A Stanton B. Samenow.

Q Where do you live, Mr. Samenow?

A I reside in Falls Church, Virginia.

Q And, what is your occupation or profession?

A Clinical psychologist.

Q Are you a married man?

A Yes, I am.

Q Do you have children?

A Yes, Sir.

Q You say that you are a clinical psychologist. Could you give the jury a general description of your educational background?

A Yes. I have a Bachelor's in Psychology from Yale University, 1963. Master's in Psychology University of Michigan, 1964. Ph.D. from the University of Michigan in Psychology, Clinical Psychology as a specialty, 1968.

Q And, would you just kind of summarize your [1705] work experience work experience since your educational background was completed?

A Yes. After receiving my Ph.D. in 1968, I worked at the University of Michigan, Medical Center and then I worked at Norville State College in the Young Adult Unit. This is a suburb of Detroit. I was Chief Psychologist on that unit and that was approximately a year, until February, 1970. I then, became Clinical Research Psychologist of the St. Elizabeth Hospital in Washington, D.C., in the program for investigation of criminal behavior. I was at St. Elizabeth's from 1970 to mid-1978, and from mid-1978, until the present time, I have had a private practice of psychology in Alexandria, Virginia.

Q In your career, have you had the occasion to write any books?

A Yes, I have.

Q You authored these books, for example?

A Yes, Sir.

Q What books have you written?

A I am co-author of the three-volume set of Criminal Personality.

Q That is the three volume set I have setting up here [1706] in front of me here?

A Yes, it is.

Q Entitled Criminal Personality, is that correct?

A That's correct.

Q What is Volume One pertaining to?

A The first volume is called Criminal Personality, A Profile for Change. Volume Two is called, Criminal Personality, Change Process; and Volume Three is called, Criminal Personality, The Drug User. These were written in corroboration with Dr. Samuel Yochelson, psychiatrist.

Q Were these based on any particular type of resource that you and Dr. Yochelson, performed together?

A They were based on what came to be a seventeen year in depth resource treatment study of male offenders. I say came to be, I was part of that study for approximately eight and a half years and Dr. Yochelson preceded me, starting the study in 1961.

Q Were you there when the study was concluded?

A Yes. Dr. Yochelson died in 1976, and I continued to work, including the writing of the third volume and the conclusion of the project, and then, I [1707] left St. Elizabeth's and I began private practice.

Q What was the date of publication of that three volume set on Criminal Personality, if you recall?

A Volume One, 1976, Volume Two, 1977; third volume, it did not come out to 1986.

Q Okay. Have you written any other books in addition to those three that you co-authored with Yochelson?

A Yes. I was co-author of Inside the Criminal Mind, a book that was published by the Times Book Division of Random House in 1984.

Q Is this the book that I am holding up here?

A Yes, Sir.

Q And, have you written any other books?

A Yes. A book that was published last year, 1989, entitled Before It is Too Late, Why Some Kids Get Into Trouble And What Parents Can Do About It, also, published by Times Books, a Division of Random House.

Q And, that is the book that I am holding up now?

A Yes, Sir.

Q Any other books?

A No, Sir.

Q Have you written any kinds of articles or publications, things of that nature?

A There are a number of articles that have to do with [1708] the area of criminal behavior.

Q Have you also had the opportunity to be a speaker or lecturer or teacher?

A Yes. In addition to having had an adjunct, assistant professorship, actually instructorship at George Washington University, Medical School, I have been since 1977, a teacher in the sense of providing continuing education at professional seminars in nearly every state in this country. I make lengthy, sometimes up to three days worth presentations to law enforcement, correctional,

mental health, social service, educational and others, all having to do with criminal behavior.

Q Have you also in your private practice had an opportunity to deal with the Criminal Justice System?

A Yes. My private practice is largely concerned with forensic psychology, and forensic psychology essentially deals with matters that come from the courts. The work that I do largely is in the area of criminal behavior, also, I do some child custody work, particularly in areas where abuse is alleged to be an issue.

Q Have you ever served on any kind of a task force, or held any kind of an advisory position?

[1709] A Yes. I have been a consultant to a number of agencies, including the Federal Bureau of Investigation, the U.S. Bureau of Prisons, Federal Probation, and a number of other agencies. I was also appointed by the former President Reagan to the Task Force on Law Enforcement in 1980, the Task Force on Victims of Crime in 1982, and as a conferee on the White House Conference for Drug Free America in 1980 – I don't remember the year, I think it was '87.

Q Okay. Do you hold a membership in any professional associations?

A Yes, I do. The American Psychological Association in Virginia, the Psychological Association in the District of Columbia, that is Washington, D.C.; Psychological Association, the Virginia Academy of Clinical Psychologists, the Virginia Juvenile Officers Association, and the Northern Virginia Society of Clinical Psychologists.

Q Are you licensed to practice in any particular state?

A Yes, I am licensed to practice psychology both in Virginia and Washington, D.C.

Q The type of work you do now, is that generally, aside from your testifying and speaking and [1710] lecturing engagements, is that generally limited to your forensic psychology practice?

A Yes, I am virtually on a daily basis, except if I am making presentations out of the area, or on those relatively infrequent occasions when I am not out of town as an expert witness, I do-see both juveniles and both adults, male and female offenders, who are referred to me by a court, by Defense attorneys, by schools and by other agencies. So, my work, really on a day to day basis, has to do with the evaluation and counseling of offenders.

Q You mentioned earlier that you had worked with Dr. Yochelson, is that correct?

A Yes.

Q At St. Elizabeth's Hospital. Can you tell the jury first of all, what is the St. Elizabeth's Hospital or was at that time?

A St. Elizabeth's Hospital is a large psychiatric facility. It was run by the federal government, particularly under the National Institute of Mental Health. It was under the federal offices while I was there. Several years ago, it became a – it was turned over by the government to Washington, D.C., but, in any event, one [1711] division of St. Elizabeth's Hospital that is the Forensic Psychiatry Division, and that does have people who are

sent to St. Elizabeth's for the determination of competency, and it is for determination in insanity defenses, that type of thing, and I should add for clarification that the study that I was a part of, did not simply deal with hospitalized patients. Half the people in this study never were hospitalized. They were offenders, but, they came to us through other agencies.

Q The study that you were involved in there, I believe you testified that you were involved some eight, eight and a half years, is that correct?

A Yes.

Q And, the entire study itself, how long did it take?

A The entire study was from 1961 to 1978, approximately, seventeen years.

Q And, you were there at the conclusion, is that correct?

A Yes.

Q Okay. Is that study a significant study in your area of speciality?

[1712] A Well, I think I can say it is, I hope that will not seem immodest. The reason I say I think, it has been seen over the years as significant, is simply because I had been asked to speak all over the country, repeatedly, to train groups of people who deal with offenders, how to better understand offenders, what are they like, and so, the study itself became a spring board for professional training, professional teaching and there has been interest throughout the country as well as in Canada.

Q What is some of the important aspects of that study? If you can give that to the jury.

A I would say that the – gosh, most definitely, try to be brief. But, there were three aspects of the study. One was to look at what we believe, when we begin the alleged cause of the crime, we were interested in why is criminal behavior, The second aspect was to understand the thinking processes behind criminal behavior; The third part of it was to try and find a way to work with some offenders under certain circumstances to help them change.

Q What did you discover or what did this study show as to the why's if criminal behavior, if [1713] there were any significant findings in that area?

A In terms of the why's, virtually every, single thing that the late Dr. Yochelson and I believed when we began the work, turned out to be in error. We essentially took the view and we believed that people turn to crime largely because of the factors outside themselves, pressure of social conditions, adverse home environment, abuse, bad parents, peer pressure, watching crime on television, and in other words, we saw the source of crime, largely, not totally, as eminating outside the offender. I think you could say an offense, in a sense, we saw the offender as a victim of a force, outside himself. We had an opportunity to spend up to eight thousand hours with some of these people in our study over the entire period of the study, when they were not in legal jeopardy, that is in research, and we found none of those factors that we believe were causes were in fact, necessary or sufficient conditions to explain why.

What we found instead, is we really don't know why. Nobody really knows why anybody embarks on a life of crime, and one that expands [1714] and intensifies. What we did then, was to turn to the thinking, the choices that, that person makes and so, then, what we came up with was a profile of thinking patterns, but, what we did find is that the offender used past adversities to explain away why he did what he did. In other words, he used past problems as justification.

Q As excuses?

A Excuses.

Q But, your findings were to the contrary, but, it was not necessary due to their past history?

A That is correct. Plus the thinking that the crime resides within the individual, he is not just simply a victim of his environment, and when held in the crime of environment, he makes certain choices, maybe in one sense say this, that what we became far more strict than the circumstances that a person comes from, is how he chooses to deal with whatever life hands him.

Q Matter of choice, then?

A Yes, sir.

Q And, do you think then, that comes down even to a criminal as a matter of choice, irregardless of their background?

[1715] A I didn't understand.

Q The criminal, it still comes down to the matter of choice, is that ultimately –

A I would say a series of choices that people make over time.

Q A few weeks ago, did I contact you and in connection with looking over some documentation in this particular case?

A Well, actually, it was June 25th, and Mr. Terry Brown called me.

Q Okay. And, were you forwarded some material concerning this particular case?

A Yes, I was.

Q I will just kind of summarize those materials and see if these are the documents that I sen to you.

The confession of the Defendant that was dated 1979, I believe, two of them. Information concerning 1977 rape conviction involving a Diane Koch. The Defendant's records from Austin State Hospital, University of Texas Medical Branch at Galveston, TDC Medical and Mental Health Records, Mental Health or records from the Polk County Mental Health and Mental Retardation Unit, records from the Mexia State [1716] School, records from the Texas Rehabilitation Commission, the Rusk State Hospital, the Goose Creek Independent School District, Competency and Insanity Examination by Dr. Kenneth A. Vogtsberger, TDC Disciplinary Records on this Defendant, both for his current incarceration and prior incarceration, I believe a Competency Trial Transcript, is that correct?

A Yes, Sir.

Q Are those records that you have there in front of you now?

A Yes, they are.

Q Have you reviewed those documents?

A Yes, I did.

Q Did you memorize all of them?

A No.

Q Okay. Doctor, with respect to your review of the records of Johnny Paul Penry, as well as based upon your prior experience, training and education, I am going to ask you a few questions concerning this matter.

BY MR. SMITH:

Your Honor, can I make an objection at the bench?

BY THE COURT:

[1717] What is your objection?

BY MR. SMITH:

Well, I would object under Estelle v. Smith, the amendments that I cited to Your Honor earlier this morning with respect to Dr. Quijano, and the other basic objections that I cited. I also, if there is any ambiguity he relied on, we would ask for a voir dire to clarify that extension.

BY THE COURT:

You all approach the bench, just a moment.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

I just don't want that to be any problem in the future by establishment, relied on everything including the testimony of Dr. Quijano, relied on Dr. Pebbles' examination back in '77, the TDC stuff, everything that I have been objecting to right along, the Competency Hearing Transcript, all of it.

BY MR. PRICE:

[1718] What now?

BY MR. SMITH:

The transcript of the Competency Hearing.

BY MR. PRICE:

The Penry's testimony from the Competency Trial, 1980, is what I was referring to when I said transcript.

BY MR. SMITH:

Is that all?

BY MR. PRICE:

The other items that he did see that, and he did rely on it. The other items I just went through, He relied, I suppose on all of it.

BY MR. SMITH:

That's all I need. I make the same objection.

BY THE COURT:

Your objection is overruled.

(END OF DISCUSSION HELD AT THE BENCH.)

Q Doctor, with respect to those records, did you learn from reviewing them that the Defendant has been diagnosed with varying degrees of mental retardation over the past, some twenty-f [1719] years?

A Yes, I did, from mild to severe.

BY THE COURT:

Excuse me just a second, Mr. Price. Would you clarify that one transcript that he relied on? There was a little misunderstanding until you came up here. The Competency Transcript?

BY MR. PRICE:

Of 1980.

BY THE COURT:

You need to ask him that.

Q Okay. You did look at the Competency Transcript from 1980?

A Yes, I did.

Q Okay.

BY THE COURT:

Alright. You can go ahead.

Q Likewise, did you notice that he had been subjected to various and sundry forms of IQ test over the years?

A Yes, I did.

Q And, did you notice that those IQ testings varied somewhat in their scores from the moderate to the mild mentally retarded range?

[1720] A Yes.

Q In viewing, generally speaking, the records pertaining to the mental retardation of this individual, was there anything about that, that caused you any kind of a skepticism concerning his condition?

BY MR. SMITH:

Objection for lack of foundation, no showing that man knows anything about the mentally retarded or not.

BY THE COURT:

Restate your question, Mr. Price.

Q Well, with respect to IQ tests, generally, do you use those in your normal everyday practice?

A I wouldn't say everyday. I do give them and I have given quite a number of them over the years.

Q You are familiar generally with what IQ tests are?

A Oh, very much so.

Q And, you have reviewed the IQ tests that were given to the Defendant, over the years, and the one that there was records available for, I guess?

A Yes.

[1721] Q Are IQ tests, generally speaking, the only thing that you rely upon in making a determination of mental retardation?

A I would say this, that IQ tests –

BY MR. SMITH:

I am going to object to the question, Your Honor, need to get the foundation for him making a determination. I would object.

BY THE COURT:

Overrule the objection.

A That IQ tests measurers certain types of intelligence, or certain manifestations of of intelligence. IQ tests are controversial because they do not necessarily measure a person's adaptive skills. In fact, there has been a clammer throughout the professional circles throughout the country I would say without exaggeration, to find other ways, other valid ways of measuring intelligence, other than the long accepted intelligence test. Intelligence takes many forms, is what I am trying to say, so, that IQ tests are not to be the end all of measuring intelligence.

Q When you say adaptive skills, generally, what [1722] are you speaking of there, Doctor?

A Well, I am talking about a person being able even to put together cause and effect, a person being able to read other people, but to develop an understanding of other people. IQ tests taking specifically the two most recently given to Mr. Penry, the Wechsler Intelligence Scale, that is one for children, the Intelligence Scale for Adults or the Sanford Benae, many of these are relying on specific verbal learning vocabulary, information items, even items that don't have anything to do with school learning, but, they are called performance tests, where you may put together blocks to make certain designs, and

even these tests, demand concentration, association, sticking with something that is frustrating, taking time and you can have a person who is able to read other people, who can sustain themselves in the world, but, he may do very poorly on the Wechsler or the Stanford Benae. In other words, people do go to work, and they do live in this world, even with very low scores on IQ tests.

Q Did you, in reviewing all of those records on Mr. Penry, see any background information concern [1723] his adaptive skills?

A Well I would say this –

BY MR. SMITH:

Your Honor, can I have a continuing objection to this line Your Honor, along mental retardation?

BY THE COURT:

Okay. Objection is overruled.

A If I were just to stick with observations that others make who did assess him, there were several occasions that the scores may well be an under-estimate of his intelligence.

For example, when he was tested in 1973, a Carol Pearce, Psychology Intern, said Johnny's social skills may be much higher than his scores indicate. The Stanford Benae administered in 1976, in Angelina County, there is a statement, "This appears to be an under-estimation of his ability." And then, in another statement from the Rusk State Hospital Records, this is in 1973 "The obtained IQ's probably do not accurately reflect the intellectual capacity."

Goose Creek, those are the independent school records that talked about how well – the quote is, "He can redirect his attention unaided. [1724] His oral language is adequate for communication with peers."

It is these sorts of statements, I think, that tend to get at the adaptive skills, social skills, which items on the test themselves which do not necessarily measure.

Q Would planning, the ability to plan and scheme and things of this nature fall into the area of adaptive skills?

A Yes, certainly.

Q Did you see any indication of that in the records that were submitted to you, there on the part of this Defendant?

A Well, yes, even in the particular crime at issue, the rape/homicide of Pamela Mosley Carpenter, there was an idea that was incubated in the mind, that is, there was thinking for three weeks about the individual. There was going to the house, then was planning, checking it out, going around the house. In other words, he indicated in that crime and in other rapes, or attempted rapes, the ability to plan, to think ahead, to consider consequences.

Q Okay. With respect to the rape of Diana Koch, was there any examples there that you saw in the [1725] information furnished to you, of planning and scheming and that ability?

A Yes. From my memory, of what he did there was to convince that lady, that was very significant in picking up strangers, giving a stranger a ride but, he was very convincing that he needed to go to a scene of an accident,

which his brother had essentially been in, and did convince her to give him a ride, got her hooked into that whole story.

Q If the evidence further shows, and I know that you weren't present during her testimony, but, if the evidence further showed that at the conclusion of that escapade, when they were confronted with two other individuals, that had given them a ride, and when she made out cry to those individuals, if he instantly claimed that she was his wife, and she just acted that way, and she kind of through fits and acted that way, from time to time, would that indicate to you any kind of an ability to think on the spur of the moment?

A I would say that it would be a good example of thinking quickly on one's feet.

Q Right.

[1726] A To obtain the objectives that one has in mind.

Q Assume further that the evidence was that they didn't buy that story, and he immediately went into another story, and tried to bribe them by promising to get them some money, would that indicate the same thing?

A Another example of quick thinking, and again, a mind that has had an objective, and if one group doesn't work, one is towarded, one quickly comes up with another idea.

Q Would that fall into the category of adaptive skills that you have been referring to?

A Well, the reason that I am hesitating at adaptive skills, the fact that he was able to do that, with that woman, it is an adaptive skill, but certainly it is an adaptive skill that was used for evil.

Q But, adaptive skills can be used for good or evil?

A That is the capacity to plan, the capacity to think on one's feet, the capacity to think of alternative routes to a particular objective.

Q And, get back down to the choice of the individual then?

A Certainly.

[1727] Q Whether you want to use those adaptive skills for good or evil?

A There is a choice.

Q Did you notice various diagnoses of this Defendant throughout his mental health history?

A Many.

Q Okay. Does that strike you as kind of unusual Doctor?

A No, not really, because he was a very, very puzzling person to the people that confronted him over the years, and so, really, the diagnoses ran – . I won't say that everything that he was termed, that you could term somebody, but, boy there was a long list. Brain damage, psychosis, adjustment reaction, of course, the mental retardation, anti-social personality, and there are many – of such an individual, and people saw different – at different times, and they were certainly puzzled by what

they saw, and I think that has an awful lot to do with the variance of diagnoses.

Q Why do you feel like that there was such a variance there?

A Because I think this man has been involved in many, many different ways, depending upon what [1728] his objective is. There were numerous citations in the record, both I believe in the medical records and the disciplinary records, that if he was angry and if he wanted to lessen the severity of punishment for an infraction, he might threaten to kill himself, so, therefore, he would appear to be verbal. There were times when he appeared to be very non-verbal and not to understand very much. So, this was attributed to retardation.

The adjustment reaction, well, there were times when he was able to behave pretty well, he would get paroled to the rape conviction, the records reflect that he did well then, so, perhaps it was adjustment reaction. So, again, people saw slices of behavior and based on what they saw, they might make a diagnosis, and others say the psychiatrist, indicate that there are some observations that he heard voices, and they were auditory, and I believe, visual hallucinations Well, there was one doctor that had, I think it was Dr. Pebbles, I have to check my notes, who conjectured that he may well have picked this up at Austin, at the state hospital, and so, there was some question about malingering in terms of [1729] psychosis, in other words.

BY MR. SMITH:

Renew, for the record, Estelle v. Smith objection and move to strike the testimony from the record.

BY THE COURT:

Objection is overruled.

BY MR. SMITH:

And, a Motion for Mistrial.

BY THE COURT:

Motion for Mistrial is denied.

Q Go ahead, Doctor.

A It was Dr. Pebbles, who stated, and this was on the 19th of May, 1979, he, in reference to Mr. Penry, relates that he has on occasion, heard voices and saw things, but, he is very vague, and I, Dr. Pebbles, talking people, that he probably learned this at Rusk State Hospital and is using this as an excuse to cover up his offenses.

Q I think that maybe at the date that you said, May of 1979, I believe it should be May of '77, Doctor.

A I may have typed the wrong date in my notes here, I don't know.

[1730] Q When he was examined by the Polk County MHMR?

A Yes, it is in the Polk County Folder.

Q Okay. Was that on the first rape case with Diana Koch examination?

A Yes.

Q Okay. What again did Dr. Pebbles say there that he may have learned that?

A At Rusk State Hospital, as an excuse to cover up his offenses.

Q Did you see instances where he would use maybe mental retardation as an excuse?

A Yes. There was several observations made by his using, or at least a conjecture that he was using the mental retardation and again, the TDC Medical Records, Volume One.

BY MR. SMITH:

Same objection, same motion, Your Honor.

BY THE COURT:

Objection is overruled.

A This was, if my memory serves me correctly, it had to do with a breaking of a sink in his cell, and Mr. Penry felt he should not have to pay because he is retarded, and in a discussion at that time, he brought up, this is a quote, "If [1731] I was working, they may think I am not retarded, anymore." In other words, he thought that the fact that he was working in a work capable program, might suggest that perhaps he wasn't retarded.

Q And, just generally speaking, were there examples of where he would use his mental retardation as an excuse?

A Yes.

Q Okay. Was he, or has he been diagnosed as having anti-social personality on several occasions?

A Yes.

Q Do you concur with that diagnosis, Doctor?

A Yes.

Q Would you kind of tell the jury about what an anti-social personality is?

A Well, the term anti-social personality cannot be applied to an individual unless he is eighteen or over, but, the onset occurs before the age of fifteen, and there is a list, I have the DSM3.

Q You don't have to go through it, unless you want to.

A Alright. Let me just say this. In my review of the records, there was a series of expanding and intensifying anti-social acts, virtually in [1732] every category; sexual misconduct, fire, fight, theft, runaways, and this again, very, very clearly in life, I think there was something in the records about a three-year old brother, but in any event, everyone has problems with this human, whether at home, or the attempt at school in these institutions in which he was in, because he would not live within the norms and standards or guidelines of those institutions, except again, like I said earlier, when it served his purpose, and as it obviously did in terms of earning a parole.

Q Did you note from his records a broad range of criminal behavior as you just mentioned?

A Yes. In virtually every area, sex, property, assaultive, references to substance abuse, although, there was

not a major pattern, but, it was there, and a lot of violence.

Q What significants do you attach to the fact of that broad range of criminal activity?

A Well, that this – that Mr. Penry was a person who really, simply made a series of choices over time not to live within the, as I said earlier, the norm and standards of society, that he had a mind of his own, that he wanted to establish [1733] himself in this world, in his way, to exert power over people, or control people that he could control, that he was able to shut off concerns of right and wrong, long enough to do what he wanted to do, and did so with very, very little remorse, if at all, and that is a person who, in a sense, was the law within himself.

Q Is that consistent with anti-social personality?

A Yes.

Q Okay. Is that type of conduct or behavior necessarily consistent with mental retardation?

A Is it consistent with mental retardation?

Q Right.

A I would say, if anything, it is probably pretty inconsistent.

Q Inconsistent, but, it would be consistent with an anti-social personality?

A Yes.

Q In reviewing those records and his prior criminal and violent behavior, did you note where that may have

involved any premeditation or planning, outside of the incidents that you have already mentioned about the murder at hand as well as to the rape of Diana Koch?

[1734] A Well, I think some of the things that I referred to earlier, the fact, that is, Mr. Penry was able to kind of capitalize on the appearance of being retarded, or he would threaten, there was a threat to act crazy. This was a person who did what he wanted to when he wanted to do it.

Q And, did you see specifically in his records where he had threatened to act crazy or act mentally retarded?

A Yes. This is from the TDC Medical Records.

BY MR. SMITH:

Can we have a continuing objection to everything out of the TDC records, Your Honor?

BY THE COURT:

Alright. The objection is overruled. You can answer the question.

A On Page 296, there is a quote by the staff, "He stated that he might start acting crazy if he didn't get a cell change."

Q Okay. Based on your review of those records, in your opinion, can he exercise self-control when he wants to?

A He can and he did.

Q What about acting deliberately?

[1735] A He did, and he can.

Q In your opinion, Doctor, based on those records and what you have seen of this man, would you describe him as an aggressive or a passive individual?

A Aggressive.

Q Would you describe him as violent?

A Very.

Q Is he capable of acting voluntarily?

A Yes, he is.

Q These choices to engage in criminal activity, the criminal activities that you have seen, is that based upon his free will or is he just impulsive and can't control himself?

A Well, really, no indication that he is not able to control himself, that is, this is inside, he was able to control himself and there were periods where he was relatively well-behaved.

Q Based on the records that you reviewed, would you say that he is a manipulative individual?

A Yes.

Q Have you seen any indication that he showed any remorse?

A No.

Q Is he a loud criminal?

[1736] A Yes.

Q Does he have a criminal personality, as you described previously, in your writings?

A In the extreme sense.

Q Is he dangerous in your opinion?

A Yes.

Q Is he likely to change?

A Well, you know, I think that is – it is a fair question, and I have asked questions about a person changing, and the answer is this. Who knows. That would be – have to use past records as the best indicator, and also, one other thing, you did ask me whether he had expressed remorse and I said know, and there was also, nothing that I read in this whole pile here, nothing that I recall, anyway, saying that he really felt that this way of life was no good and for any of us to change anything about ourself, I don't know if the way it looks with cigarette smoking, much less a whole way of life, you have to reach a rock bottom and you have to be fed up with yourself, not the situation and I would say the prognosis would be pretty bleak.

Q Has his criminal behavior declined or escalated [1737] as he has gotten older over the years?

A It has expanded and intensified.

Q Has it become more violent?

A Yes.

Q And, has it continued to be violent and assaultive even with him confined in a maximum security?

A Very much so, even in prison.

Q Okay.

BY MR. PRICE:

I pass the witness.

CROSS EXAMINATION

QUESTIONS BY MR. SMITH:

Q Who is Gregory Mark Campbell, Doctor?

A I beg your pardon?

Q Who is Gregory Mark Campbell?

A I don't know.

Q Was he a patient of yours?

A Gregory Mark?

Q Campbell. Is he a patient of yours?

A I cannot reveal who my patients are.

Q Was he a drug dealer?

A I cannot make any comment.

Q Well, it is a matter of public record that you submitted a report for him, isn't it?

A I don't know if that is a matter of public record.

[1738] BY MR. SMITH:

I ask the reporter to mark this as a Defendant's Exhibit, a document.

REPORTER'S NOTE: (WHEREUPON DEFENDANT'S EXHIBIT NUMBER TWENTY-NINE WAS MARKED FOR IDENTIFICATION BY THE REPORTER.)

BY MR. SMITH:

May I approach the witness?

BY THE COURT:

Yes, Sir.

Q I show you Exhibit Twenty-Nine, Doctor. Does this refresh your memory that it is a matter of public record that you submitted a report to the United States District Court on the matter of Gregory Mark Campbell?

A That is so shown in here.

Q And, it is a matter of public record that Mr. Campbell made the mistake of arranging a sale of fifty thousand dollars worth of cocaine to an under-cover agent.

A I don't recall the amount.

Q But, he did get into legal trouble for doing that, didn't he?

A He did.

[1739] Q If you look at the document, does it reflect your memory on the amount?

A I see the amount that he sold.

Q What is the amount that he sold?

A Five hundred grams.

Q That is what he pleaded to. What is the amount he really sold? Keep reading.

A Yes, here is a price. The price is $20,000.00 per kilogram of cocaine was negotiated.

Q Twenty thousand per kilo. How many kilos – no, not the plea, how many did he really sell?

A They are negotiating the sale of two –

BY MR. PRICE:

I am going to object unless Counsel has got some place he is going here with the relevance to this case.

BY MR. SMITH:

Relevant to credibility, Your Honor.

BY MR. PRICE:

What credibility? That he had a patient?

Q Did you submit a report to the District Court saying Mr. Campbell is a good kid?

A I didn't.

[1740] BY MR. PRICE:

Object to relevance. I still don't understand the relevance.

BY THE COURT:

Ya'll approach the bench, just a moment.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY THE COURT:

Where are you going?

BY MR. SMITH:

Perfectly obvious, he is not upset with criminals when they are paying his fee.

BY MR. PRICE:

I didn't say he was upset with criminals anyway.

BY MR. SMITH:

Something that I intend to ask him about Mr. Penry, who he couldn't profile so well, Mr. Penry has paid his fee.

BY MR. PRICE:

We would ask for voir dire outside [1741] the presence to enable us to find out where he is going with this thing.

BY MR. WEEKS:

We are talking about a drug case and we don't know anything about drugs.

BY MR. SMITH:

I don't intend to go into any more of the details.

BY THE COURT:

I will overrule your objection.

BY MR. PRICE:

Just let him go.

(END OF CONVERSATION HELD AT THE BENCH.)

Q You say you didn't use the expression, "Good Kid," in the substance of your report?

A I don't have the report here, I don't think that is applicable for me to discuss the personality of a person that I have evaluated, but, if you have the report there.

Q I don't, Doctor. I would show it to you if I did. Did you get a fee from Mr. Campbell for doing the report?

A I get a fee for all of the professional work I do.

Q Including the work that you are doing today, [1742] correct?

A Correct.

Q Mr. Campbell get off with fourteen months in jail?

A When you say did he get off with I don't know how many months he actually served.

Q Look at Page 7 of the document in front of you. Does that refresh your memory that he was sentenced to fourteen months in jail?

A That is what it says. I was not asked, I was not at the hearing.

Q I take it, Mr. Campbell didn't fit your model as a criminal personality?

A Well, criminal personality is a matter of degree and so, certainly there were certain thinking patterns that underlie selling illegal drugs, but, it is a matter of degree.

Q And, with him, it wasn't just a great degree that he should get more than fourteen months in jail, correct?

A That was a matter of the court deciding.

Q You helped the court make that decision, didn't you?

A What I did, was to describe as I do in submitting a report for anybody that I evaluate, I reported [1743] my findings to that individual, which I am not at liberty to discuss here.

Q But, the federal guidelines would have given Mr. Campbell six and a half years as a minimum, correct?

A I don't know what the guidelines are. Here it was pointed out to me, I don't know what they are.

Q Try Page 4.

A Alright. Yes.

Q And, can you tell us without being unethical whether you didn't say in substance to the judge that Mr. Campbell deserves a light punishment?

A I did not take a position as to whether he deserved a light punishment or what punishment should be. This man did commit a serious offense, and his life, as I recall, was not one of expanding and intensifying criminal activity over a period of many years.

Q And, did he pay your fee?

A He or his family, I don't recall.

Q If Johnny Penry or his family paid your fee, would that change your view of his conduct at all?

A Not at all.

Q What is your fee being paid by the State today?

[1743] A I am being paid $2,500.00.

Q Is that a flat rate or an hourly rate?

A That is flat rate.

Q And, how many hours you put in?

A Well, this is the fee for being here today, and then, for reviewing the documents it is $150.00 per hour.

Q Twenty-five hundred just for showing up?

A For being out of the office and being here, yes, that's correct.

Q And, then, a hundred dollars an hour – how much an hour?

A A $150.00 an hour.

Q A $150.00 an hour for how many hours?

A Approximately twenty.

Q Fifty-five hundred for the whole performance?

A Somewhere around that.

Q Who is the Trail-side Killer?

A Trail-side Killer is David Carpenter.

Q And, you testified in the Carpenter Case?

A I haven't thought about it, but obviously.

Q You testified – I am going to call him the Trail-side Killer so we don't get confused, okay?

A Alright.

[1745] Q You testified against the Trail-side Killer, right?

A I testified in a penalty phase, yes.

Q But, you were called by the State?

A That's correct.

Q And, paid by the State?

A Correct.

Q And, what did Mr. Carpenter do to get the name of the Trail-side Killer?

A He killed a number of women in various parks on trails in California.

Q What is the number of women he killed?

A I don't remember.

Q More than seven?

A I think there was somewhere around that. He may have been suspected of killing even more.

Q Was he an intelligent young man?

A He was intelligent.

Q Was he ever physically abused by his parents, asfaras you know, physically abused?

A There was a controversy about that.

Q Did he suffer abuse, Doctor? I think there was a claim of emotional abuse, not physical abuse.

A Primarily emotional.

Q Who is Dr. Jeff McDonald?

[1746] A He was the marine who killed the members of his family in North Carolina.

Q His wife and two little girls, right?

A Correct.

Q You testified against him in a civil case, correct?

A That's correct.

Q And, he was a successful young doctor, correct?

A That's correct.

Q And, a talented young man?

A Right.

Q Seemed perfectly normal until that happened?

A No, that was from all appearance.

Q No history of child abuse asfaras you know?

A You mean his being abused?

Q Yes.

A Not that I recall.

Q Essentially, the story there was that he was a normal doctor who came home one night and decided to kill his wife and two little girls, right?

A Well, it wasn't quite so simple. In fact, what I was asked to testify to was also the use of material to talk about the kind of personality that there was. A person just doesn't go kill somebody out of the blue.

Q You were hired by his adversary in that particular [1747] case, right?

A Yes. The suit was against the person who wrote the book.

Q And, your pay was from John McGinnis, who wrote that book, right?

A That's correct.

Q Now, I guess, what I am asking you, Doctor, whether you believe that there are any significant – you believe that the Trail-side Killer and Dr. Jeffrey McDonald are different in any significant way from Johnny Penry?

A Well, the key word is significant. In many ways I don't think there is any difference at all. In some ways, there are differences.

Q There is a difference in IQ isn't there?

A Yes.

Q Indeed, have you – you testified that there has been a clammer for better conduct of telling IQ, and that clammer is going on, isn't it?

A Sure.

Q They haven't found one yet, have they?

A No, they haven't.

Q You are not expressing the opinion as to what Johnny Penry's IQ is, are you?

[1748] A No.

Q You made a reference on direct examination to my notes. Do you have those notes there?

A I'm sorry, reference to what?

Q You said that there was a typo in your notes, the year, 1979. Could I see your notes?

A Sure.

BY MR. SMITH:

May I approach, Your Honor?

BY THE COURT:

Yes.

A Here, let me put them in order and you can see them all. (Witness handing).

Q Did you actually type or dictate these yourself?

A I typed those myself.

Q Okay. You don't mind if we borrow them for a few minutes?

A Be my guest.

Q Thank you. Was there any police report among the documents that you reviewed, Doctor?

A I believe so.

Q Did you ever do a final report of these other than these notes?

A No.

Q You talked about that eighteen year study on [1749] direct examination. Do you remember that?

A Seventeen year study, yes.

Q And, it was a study of two hundred and fifty-five people?

A Yes.

Q And, everyone of them was significantly different from Johnny Penry, weren't they?

A Certainly everybody is a different individual.

Q You know what I am getting at don't you?

A No, I'm not sure.

Q Isn't it true that everyone of those two hundred and fifty-five people were of average intelligence determined by prior testing?

A No, we had several people in that study, at least two or three who tested in the high fifties, low sixties, but they were all of normal intelligence.

Q You added, that last line when you saw me taking out your book, didn't you?

A Certainly, because we had people – we had two or three people that tested in the sixties, but, as it turned out, they were perfectly able to converse, and that test was by no means an indicator of their intelligence.

Q Let me ask it again. True of false, some were average intelligence as determined by prior [1750] testing?

A As I recall, there were two or three people where there were variations in their testing, and they were as low, I don't remember whether they were in the sixties or we had anybody below that.

Q Did you ever take a true or false test, Doctor?

A I hate them.

Q Well, I am going to subject you to one right now. Try it again. Are subjects of average intelligence as determined by prior testing, true or false?

A Yes, because – you got to let me make this point, and that is that we had two or three people in that study who were tested and they were tested – some of them were tested more than once, some of these results were like Penry's and a number of them had variations in their source, so, I am going to be perfectly honest, which I certainly want to be, their scores would vary, and certainly everyone that we had at some point had, if you just use the score, had an average intelligence but, not to every single test.

Q This is your book, right, The Criminal Personality?

A Sure is.

[1751] Q Just for my benefit, read the sentence I under lined out loud on Page 4.

A Well, you did a good job of doing it. I will be glad to read it.

Q See if you can.

A "Our subjects were of average intelligence as determined by prior intelligence" and I stick with that.

Q And, is Johnny Penry of average intelligence as determined by prior testing?

A No.

Q So, most of your subjects had no genuine learning disability, right?

A I think that would be a fair statement.

Q And, you recognize that learning disability can be a seriously handicapping condition, correct?

A Sure.

Q And, being mentally retarded is worse than a learning disability, right?

A Yes.

Q You testified on direct examination about the term anti-social personality disorder, right?

A Yes.

Q Is the term psycho-path generally a synonym for [1752] anti-social personality?

A The name doesn't label it, psycho-path, and socio-path and anti-social personality.

Q Different labels for the same thing, right?

A Pretty much.

Q And, you recognize those as being scientifically valid labels?

A Oh, I have my quarrel with them.

Q When you testifying then on anti-social personality, you didn't tell the jury about the quarrel that you had with that term, did you?

A I think the question –

Q The question is whether you told the jury about the quarrel that you had with the term anti-social personality disorder?

A No.

Q You have written, haven't you, although, diagnoses may make a distinction between the psycho-path and criminal, essential purpose, one is hardly different at all from the other, that is your opinion, isn't it?

A Yes.

Q And, you have written, have you not, "I have many quarrels with psychiatric labels, but never in a report to a court, school or other agency, [1753] have I written that a young child has an anti-social personality." Did you write that?

A That is absolutely correct.

Q Have you broken your string now?

A Not at all. I asked what diagnostic category would be closest. I can't make up my own, so, if one is going to take a diagnostic category out of the DSM3, that is certainly the closest.

Q But, you didn't tell the jury that you were just picking the closest and in fact, you thought, that was a category that concealed more than it reveals, right?

A I think all of the categories have those problems.

Q The problem that they concealed more than it reveals?

A I would say yes, to just simply stick a label on a person without really explaining how that mind works and that person feels themselves in the world, yes, I think there are problems with that.

Q Did you discuss that label on Johnny Penry without going into your speech about how bad labels are, didn't you?

A I tried to be responsive to the question.

[1754] Q If you had been asked if the label was meaningful you would have told him no, is that correct?

A Asfaras any label from the DSM3, that would certainly be the closest. I do not tend, myself to believe that labels are particularly useful.

Q What is a psycho-path, the psychiatric classification?

A The psycho-path was a term that was pretty much called that and I would think, again, the same point about labels.

Q And, you have also made the point, haven't you in all fairness, I think you said it on direct examination, too, attempt to project who will commit crimes in the future are notoriously very difficult, right?

A It is difficult.

Q Those two hundred fifty-five men in your study, is it fair to say, that most of them had caring parents to do the best to help with their children?

A That was not initially what I told you, but as we went on in our study with them, we found that that was

basically the case. Again, a matter of degree, some more some less.

Q You have written that on child abuse, haven't you?

[1755] A Some.

Q You're not a specialist, but, mention it in the course of your writing, some?

A It is mentioned.

Q And, your generalized feeling that the child abuse is a child's fault, right?

A I never, ever said that.

Q Okay. Have you said, or did you write the following, "One boy was punished as a child by being locked in a bathroom, tied up in the basement and beaten with a strap. He was the only one of six children who had been raised by his parents to the point that they metted out cruel punishment, not to condemn the parents' method in dealing with him. The point is that children like him, by unrelenting provocation, may have a violent reaction to the parents' placid disposition." Is that what you wrote?

A Absolutely.

Q Do you think Johnny Penry is an example of that?

A I think he may well be. Again, without condoning, and I think that is important, I didn't say in that book, that tying a kid [1756] to a bed and beating him was justifiable or condoned. I talked about the nature of the youngster and what he illicits from his environment.

Q And, you say, Johnny Penry may well be an example, he may well be an example of what the child illicits, right?

A In part.

Q Did you have an opinion of whether he is or not?

A I think to some extent it was from what I read his mother had problems of her own, and again, it has nothing to do with justifying what was done to him, but, if a youngster is difficult and hard to contain, and bites his three year old brother and destroys things and breaks out windows, I think even the most patient and reasonable parents would be tried pretty hard, even less, a parent that might have problems of her own.

Q Doctor, we have heard testimony in this case that Johnny Penry's mother began to beat him violently starting with a nine month old baby in a high chair. Assume that testimony to be true. In your opinion, did he provoke that?

[1757] A I would have no evidence that at nine months he did. I don't know what he was like at nine months, I don't know.

Q Well, the testimony is that his mother hit him hard with her fist because she didn't like the way he was eating. Is that the sort of provocation that you wrote about in your book?

A No, it isn't, what I wrote about in the book.

Q Got some testimony that when he was two years old, he was on purposed scolded in the sink. Do you think that he provoked that?

A I have no information about provoking that.

Q You wouldn't want to venture an opinion as to whether he provoked that or not?

A I would rather stick to the facts that I have. I don't know. I would doubt it, but, I don't know. I don't know what went on.

Q And, you are not saying a psycho-path had it coming are you?

A No, I am not saying that.

Q There is testimony that when he was quite a young child, his mother held him under water in the bathtub, screaming, I am going to drown you, you little bastard. Would that testimony mean that he provoked that?

[1758] A I don't know what led her to doing it, and certainly, again, the same answer, I do not have facts about what he was doing, or the truth of those allegations. I can't comment.

Q Well, you are commenting pretty good when Mr. Price was questioning you. You know the truth of all of those allegations that you commented on?

A You are asking me, if I understand your question, what did Johnny Penry provoke when he was two years old, or whatever, a young age or whatever.

Q Exactly.

A And, I do not know that he provoked those behaviors.

Q You have an opinion as to whether he did or not? Let's go back to the nine month old in the high chair. Give me an opinion how he provoked his mother that time?

A I don't know. Let me say this. If he did provoke her in any of these cases, certainly, her response was criminal in and of itself, and excessive.

Q You would say the same if she went after him with a butcher knife, threatening to cut off his penis?

A Yes.

[1759] Q Even if he provoked her by wetting the bed?

A Certainly.

Q Now, I am going to ask you a hypothetical question, Doctor. You know about hypothetical questions?

A Yes, Sir.

Q I want to make some assumptions. I want you to assume that he was hit by his mother's fist in a high chair, just like I told you. I want you to assume that she scolded him in the sink when he was two, that the scars are visible to this day.

I want you to assume that throughout this childhood, she beat him violently with leather belts, switches, taken from a tree, extension cords, clawed her with her hands, kicked him with her feet, she burned him with the butt of a cigarette, she left him for a long period of time in a darkened room without access to a toilet, broke his toys over his head, forced him to kneel against a heater until

his legs were blistered, she forced him to eat – , and drink urine, she called him little bastard, not affectionately, but cruelly, she went after him with a butcher knife and threatened to cut off his penis, just like I said, and when he was [1760] a two year old, the neighbors could hear him screaming during the day in pain and terror.

If that is true, that is one of the more appalling childhood stories that you have heard, isn't it?

A Yes, it is.

Q And, if you make all of those assumptions, Sir, do you have any opinion as to whether child abuse attributed in any way to Johnny Penry's bad conduct later on?

A I don't think that the cause and effect connection is established. There are certainly kids who go through some terrible, terrible things and they don't go out and rape and murder.

Q That is quite true, Doctor, but that wasn't my question. My question was, do you have an opinion as to whether child abuse attributed in any way to the bad conduct? Do you?

A I really don't know, but, I don't think it explains the path he took in life.

Q I did not ask you whether it explained it. I will ask you the same question one more time.

Do you have an opinion as to whether or not –

BY MR. PRICE:

[1760] Objection, Your Honor, asked and answered. He answered it both times.

BY THE COURT:

Go ahead and restate your question one more time.

Q Do you have an opinion whether the child abuse contributed in any way to Johnny Penry's later conduct?

A When you say later conduct, I don't know what you mean. I don't think so.

Q Your opinion is, that he would have committed those crimes if he had had a perfectly normal loving mother, just like you and me, that's your opinion?

A I think there is a fair possibility of it. There are people who come from loving homes that do some terrible, terrible things.

Q There are indeed, and you testified against a couple of them, right?

A I have testified in cases of people from all kinds of families and backgrounds.

Q But, this is not one where the Defendant came from a really loving home, and did terrible things?

A No, I never contended it was.

Q And, you would admit, Sir, that physically hitting [1762] your child can be a way of teaching him that violence is acceptable?

A A child might conclude that. But, I don't know that it is a way of teaching him that.

Q Have you written, "Whacking Their Offspring Has Virtually No Long Time Effect Except to Convey the Message of Violence Is Acceptable?"

A It can convey that message. You asked me or I thought you asked me is it intended to teach such a message. It may or it may not. Depends on the child. As you see from reading that, I am certainly not an advocate of indiscriminate beatings.

Q I am glad to hear it, Doctor.

A Well, I am glad that we have it straightened out.

Q You have also written that child abuse does not invariably produce criminals, right?

A Yes.

Q But, it does very often produce criminals, doesn't it?

A I don't know that.

Q Yet, you did find it necessary to say invariably, when you wrote that sentence, child abuse does not invariably produce?

A It is a cause/effect connection, that's correct.

[1763] Q Would you agree with me, Doctor, that the worse child abuse – let me back up. Any child, any child in the world can grow to be a law abiding adult. Is that your opinion, right?

A Children make choices, yes.

Q Would you agree with me that the worse abuse the harder it is for a child to make that choice?

A No.

Q What was your impression of Johnny Penry's mother, when you read the file?

A That she had serious problems of her own, and that as you pointed out to me, again and again, that she was certainly far from the ideal mother in the way that she reacted to her child, although, I believe that was still puzzling to me, and it is puzzling, I don't know the answer why it is, but, in that family, there were three other kids, who were not treated the same way.

Q Do you know whether she had hated those kids, the way that she hated this one?

A I suspect that she didn't, but, then again, they were all different in the way that they acted and the problems they presented.

Q They didn't provoke her the way Johnny did?

[1764] A Well, there was nothing that I read that indicated that they did.

Q Well, there is nothing that you read that indicated that he did?

A Certainly.

Q Well, when he was nine months old?

A No.

Q When he was two years old?

A As a child, the biting of his brother and the destroying property, the breaking out of windows, the wandering out of the house, I am simply saying that he was a difficult child.

Q You know how many of those allegations came from his mother?

A I think some of them did. I also believe that if my memory serves me correctly, that his aunt also documented that he was a very, very difficult child, as did some of the other documents that I read. I think I read something somewhere about his poking kids with pencils in the first grade, and his punching kids with scissors. I mean, he was trouble everywhere he went.

Q Where did you get that bit about the aunt? One of the prosecutors give you during the lunch break?

[1765] A I believe in the Harris County – in the evaluation in the Rusk State Hospital, or the Austin State Hospital Folder, I believe there is an evaluation, and I think – and I can –

Q My question is, did one of the prosecutors call your attention to that during the lunch break?

A Yes.

Q And, you say that information came from the aunt, but, do you know if the aunt ever observed the poking with the scissors?

A I really don't know.

Q Do you know who told the aunt that he did that?

A I do not know the source.

Q You read Shirley Penry's psychiatric history?

A I don't have the separate evaluation of her. I know that there was a post-partum psychosis, I know that she had many, many problems of her own.

BY MR. SMITH:

I am going to ask that the witness be shown Exhibit Sixty and Seventeen, Sixteen and Seventeen.

Q Now, Doctor, these documents are not in evidence and I don't want you to read from them, but, can you tell me if you have seen them before?

[1766] BY MR. PRICE:

Your Honor, may we approach the bench?

BY THE COURT:

Yes, Sir.

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING PROCEEDINGS WERE HELD AT THE BENCH.)

BY MR. PRICE:

He is again trying to impeach the witness improperly or whatever he is trying to do improperly and he is trying to get these records before the jury, which there has already been an objection and a Motion in Lemine which he just violated. I made verbal Motions in Lemine, the day the records were presented, that they not be offered or in any way put in front of the jury.

BY MR. SMITH:

I have not offered them. I am allowed to ask the witness what he has reviewed.

BY THE COURT:

I am going to recess any way, and let him look at those records. We may need to take up something before we bring [1767] the jury back in.

(END OF CONVERSATION HELD AT THE BENCH.)

BY THE COURT:

Ladies and gentlemen of the jury, at this time we will recess for about fifteen minutes. We will start back at about twenty-five after. Doctor, go ahead and look at those.

BY DR. SAMENOW:

Alright.

REPORTER'S NOTE: (WHEREUPON A RECESS WAS HELD AT 2:15 P.M.)

BY THE COURT:

Mr. Smith, approach the bench just a minute. You might want to help him find what you are talking about, and we might need to take it up before we get the jury back in. Anyway, I want to hear the questions in regards –

BY MR. SMITH:

The question I am referring him to at this particular page and ask if it effects his opinion.

BY MR. PRICE:

If what?

[1768] BY MR. SMITH:

Ask if it effects his opinion.

BY MR. PRICE:

About what? About the mother?

BY MR. SMITH:

Whether the child provoked the abuse.

BY MR. PRICE:

Your Honor, I would request this line of questioning outside the presence of the jury.

BY THE COURT:

You get over what I was suggesting, save some time. You show him.

BY MR. WEEKS:

I point out to the Court that we had a Motion in Lemine on that, and you ruled on it, and Mr. Smith, directly, intentionally violated that Motion in Lemine.

BY THE COURT:

He hasn't put the contents in.

BY MR. WEEKS:

He brought it to their attention. The Motion in Lemine went to even mentioning it in front of the jury.

[1769] BY MR. SMITH:

I don't think so. I haven't even told the jury what those exhibits are.

BY MR. WEEKS:

Sure did. Exactly, told him medical records of the mother, that is, fifteen and sixteen, not in evidence, and called them that.

BY THE COURT:

Right now you show him what you are looking for and we will start back in five minutes and we will take it up out of their presence.

REPORTER'S NOTE: (WHEREUPON THE COURT HELD A FIVE MINUTE RECESS.)

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION AND PROCEEDINGS WERE HELD OUTSIDE THE PRESENCE OF THE JURY.)

(JURY OUT)

BY THE COURT:

Mr. Smith, you can ask those questions.

QUESTIONS BY MR. SMITH:

Q Have you finished reading the material, Doctor?

[1770] A Yes.

Q Does it effect your opinion in any way as to whether Johnny Penry provoked his mother's abuse?

A No.

BY MR. SMITH:

Let me ask that in the presence of the jury, Your Honor?

BY THE COURT:

I don't know if you asked him that. Is that what you are going to ask?

BY MR. PRICE:

Is that all you are going to ask him about those records?

BY MR. SMITH:

Yes, Sir.

BY THE COURT:

That's all you are going to ask about those records?

BY MR. SMITH:

Yes, Sir.

BY THE COURT:

Alright. Bring the jury in.

(JURY IN)

BY THE COURT:

Okay. Mr. Smith, you can proceed [1771] with your cross examination.

Q Okay. You read what I showed you during the break, Doctor?

A Yes, I did.

Q And, they don't in any way effect your opinion about whether Johnny Penry provoked his mother to abuse him?

A No.

Q You say that you saw a couple of times this business about his biting his three year old brother. Do you happen to remember what document that is in?

A No.

Q Is it in a diagnostic evaluation dated July 29, 1965, dictated by Dr. Noel Cowan?

A Yes.

Q Read the full sentence to us, Doctor, that you were referring to.

A I will have to find it.

Q Try the second page, about the middle. You looking for the document?

A Yeah.

Q I will show it to you. (Handing.) Read the full sentence that I have underlined there, please?

A "Mrs. Penry stated that Johnny was changeable in [1772] his moods, often loving and kind, to his siblings, but, more than likely aggressive toward me and especially the three year old boy who he bites."

Q Who stated that?

A His mother.

Q Now, you asked me about the siblings and you, asked if there is any explanation, you asked if there is any explanation of where siblings turned out differently. Did anyone mention to you before you took the stand here that Johnny Penry was believed to be an illegitimate child, and only a half brother to his siblings?

A I believe that there was something in the record, but I don't recall where that is his mother had had an affair with a "mexican" and that he was an offspring of that. I don't know if that is a fact, but, I did read that.

Q Is it possible that could account for her hatred and abuse of this child?

A Well, there would be other explanations as well.

Q That could be one of them, right?

A Possible.

Q But, if the other siblings got on the stand and testified in substance, under oath, that she abused all of them, but, she abused Johnny a lot [1773] worse, would you doubt that testimony?

A If he himself said that?

Q The siblings.

A The siblings said it? I would have no particular reason to.

Q And, of course, you know that siblings – none of the siblings were mentally retarded, don't you?

A Asfaras I know, they were not.

Q It is your view, isn't it, Doctor, that child abuse is not any excuse for criminal conduct?

A That's correct.

Q Is there a difference in your mind between excuse and mitigation?

A Well, by mitigation, – there is a difference between excuse and mitigation, certainly, a person can use something as an excuse after the fact, or if there could be something in mitigation, but, I think the question still is whether or not, at least in my view, when you say mitigation, does the fact that he did experience this treatment in the hands of his mother, that mitigates the terrible crime that is committed. To me, that still implies the

cause/effect action, that because of something [1774] that happened when he was younger, that, that could somehow mitigate this terrible crime that he committed.

Q You say no?

A No.

Q And, it is still your opinion that it is a pure coincidence that he had this childhood violence, disruptive violence?

A Well, I don't think I can use the pure coincidence. As I said earlier, I don't think really that anyone has been able to establish with scientific or medical certainty why a person lives the kind of life that Mr. Penry did, why a person has a series of expanding and intensifying criminal patterns, so, I couldn't answer the question about why.

Q Well, you can't answer with scientific certainty, but, occasionally we use common sense, don't we?

A I sure hope so.

Q In common sense, Doctor, isn't it likely that child abuse had something to do with violence when you grow up?

A When you say something to do with, I don't know what you mean. I mean, that could include anything.

[1775] Q Which word are you having trouble with?

A The something to do with. I don't think that the fact that a person was abused has really – it is not a

necessary or sufficient condition to explain why a person has done all of these things that this man has done.

Q So, it is still your opinion, that if you had a kind, loving mother, never laid a violent hand on him, he would have done just the same crime?

A I think it is entirely possible.

Q But, is it your opinion?

A Yes.

Q And, your opinion is that no child abuse, no matter how severe, can ever mitigate the guilt of an criminal, even a little bit?

A I don't think it is a mitigating factor because people do and endure terrible, terrible things that don't go out and rape and murder.

Q When they go out and rape and murder, they make choices in your view, right?

A Yes.

Q And, you would agree with me that Mr. Penry is mentally retarded?

A I don't think that he is mentally retarded.

Q You can assume that he is, you don't know that [1776] he isn't, do you?

A I have my doubts, but, I don't know.

Q Assume that he is.

A That I would agree with.

Q You have your doubts that he was abused, too, don't you?

A I do not. I did not say that.

Q Well, tell me now.

A No, I said I think, too, maybe three times, that if indeed the reports are accurate, that he did endure some pretty terrible treatment. I don't think I questioned whether or not his mother did terrible things. I don't know if she did all the things she is said to have done, but if she did any of them, sure is pretty terrible.

Q Would you agree with me that the things that she did, were not entirely his fault?

A Yes.

BY MR. SMITH:

Pass the witness.

BY THE COURT:

Any other questions, Mr. Price?

BY MR. PRICE:

Just a couple.

[1777] REDIRECT EXAMINATION

QUESTIONS BY MR. PRICE:

Q You just said that what the mother did would not have been necessarily his fault, if she did in fact abuse him, is that correct?

A Yes. I cannot sit in this Courtroom and say that every single thing that she did was his fault.

Q Right. Likewise, Doctor, what he did later in life, such as rape, murder, arson, those kinds of things, when he was a teenager, when he was a grown man, you think were the fault of his mother?

A Well, I don't think his mother should be on trial here. The answer is no.

Q Did, based on the records that you have reviewed, concerning the rape of Diane Koch, did you have an opinion as to whether or not the Defendant, chose to rape her?

A I have no doubt about the matter that he did.

Q Okay. Did he choose to rape and murder Pamela Carpenter?

A He did, and he thought about going after her for several weeks.

BY MR. PRICE:

[1778] No further questions.

BY MR. SMITH:

Nothing further, Your Honor.

BY THE COURT:

You can step-down. Thank you.

BY MR. PRICE:

The State rests, Your Honor.

BY THE COURT:

Would you all approach the bench?

REPORTER'S NOTE: (WHEREUPON THE FOLLOWING CONVERSATION WAS HELD AT THE BENCH.)

BY MR. SMITH:

We would make our objection to those documents.

BY THE COURT:

We will do that after I let the jury go. I want to let them go. We are going to get the Charge today and I am going to schedule the Dickerson Hearing. I was notified this morning that he was available today or tomorrow. I just soon do it tomorrow after we go to the jury, but, that is up to you all. If you want, might could get him here in a hour or an hour

* * *

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

[51:1828] JURY BY THE JUDGE, THE ORIGINAL OF WHICH IS IN THE DISTRICT CLERK'S TRANSCRIPT IN THIS CASE, AND NOT INCLUDED HEREIN.)

BY THE COURT:

Again, you are not to consider the arguments of the attorneys that you are about to hear as evidence. You have already heard all of the evidence, it is their summation to you and their evidence to see the evidence in the light most favorable to their side of the case.

If the State is ready, you can proceed with your opening argument.

BY MR. WEEKS:

May it please the Court, Your Honor, Ladies and gentlemen of the jury, on behalf of the people in the State of Texas, I thank you for your service, and I would thank you for your first verdict, but, I think the evidence was overwhelming and clear what that verdict should be.

And, we now we come to the crucks of this case, and what this is all about. Punishment. And, I want to talk to you about [1829] some of the issues, and review the evidence with you, and what you must consider in making the decision that you are called upon to do.

You have taken your oath, and now, you have a duty to base your verdict on the evidence and the law. The Charge is fairly short. Three questions.

"Was the conduct of Johnny Paul Penry that caused the death of the deceased done deliberately and with a reasonable expectation that Pam Carpenter or another would die."

The second questions, "Is there a probability that Johnny Paul Penry would commit acts of criminal violence that would constitute a continuing threat to society?"

And, finally, the last question, the provocation question, "Was the conduct of the Defendant, Johnny Paul Penry, in killing Pamela Carpenter, the deceased, unreasonable in response to provocation if any, by the deceased?"

And, that is the last time I am going to refer to that question, because I think the evidence here is so overwhelming and [1830] so clear that there is no way any reasonable juror could find that it wasn't unreasonable. What provocation? That's all it was.

And, after you consider those three questions, then, you got to come to the issue of mitigation. Longest instruction in here is on mitigation. I want to draw your attention again as we start, and later in my argument, to the important – of that. You are instructed that your answers to the Special Issues, which determine the punishment to be assessed the Defendant by the Court, should be reflective of your findings as to the personal

culpability of the Defendant, Johnny Paul Penry, in this case.

Personal culpability. Responsibility, blame. It goes on to talk about the mitigating facts. Something that is going to lessen, reduce that responsibility of Johnny Paul Penry in this case.

Lets talk a little bit about the evidence in the case. The State opened in Punishment you are to consider all of the evidence that you heard at the first phase of this trial, everything, facts of the crime committed, [1831] the act of the Defendant, all of it. What did we start out the case and punishment with? We brought you people that had been with him in the last ten years, people that had dealt with him in prison, that knew Johnny Paul Penry.

Gregory Dennis. What did he tell you about it? Johnny Paul Penry with a club, broom handle, broken off, threatening other inmates. Got him in his cell and he had a shank, a homemade weapon, had prepared it, brought it out from under his bunk. The officer told him to give it to him, so, he broke it up. You are not going to write me up for this are you, Boss? Yeah, I am going to write you up. He was able to talk to him. He was able to converse with him, able to understand him.

Then, we brought Lt. Grant. Lt. Grant, who had been there with him from 1986 to 1989. He knew Johnny Paul Penry. Can he read and write? Yes. Can he understand you? Yes. Can you understand him? Yes. This is a man who worked with [1832] inmates with convictions and the most maximum security area of our prison system, and what did he tell you about Johnny Penry? He doesn't follow the rules, he is assaultive he is dangerious, and in

this man's opinion, he has been around him for the last three years, he is dangerous to do it again.

Then, we brought you Captain Selman. Captain Selman been around there with him maybe since '87, I believe it was, Selman was CO. Again, had to take a broken board away from him, take another weapon away from him, take another weapon from him while he is locked in the most maximum security area of our prison system, and he had got weapons. What else did he tell you about him? He understood me, he could read and write, I could understand him, he could understand me. You know what really hit me about that? Was when he talked about the privilege. Johnny Penry, could bargain with Captain Selman, bargain his good behavior for privileges, bargain his good behavior to get back off restrictions. Negotiating. Dealing. Is this poor Johnny, [1833] mentally retarded man? Does it sound like it? Captain Selman, who has been around him, dealt with him day after day, said he couldn't have him in a rec group, because he was always causing trouble. He was assaultive he was dangerous. This is a man who has dealt with him day after day after day, and he knows him. Knows him well.

Then, we brought you Frank Bragg, deputy over in Polk County, kept him back in 1980 in a courtroom, and Johnny Paul Penry got up and grabbed a big, glass ashtray and he threw it at Joe Price, and he went over the table after Joe, and it took four men to restrain him, and this is a man that has been a deputy fifteen years and he has never, ever, ever, seen a defendant do that. What does that tell you about Johnny Penry?

Captain Keith. Captain Keith, who had been down there from 1982, to 1989. Captain of it. Dealt with Johnny Penry for seven years, knew him, talked to him, dealt with him, knew the kind of person that he was dealing with. Now, what did he tell [1834] you about him? He is dangerous, he is assaultive and he will do it again. A man that knows convicts, has worked around prison systems and knows what he is doing. Very interesting, too, did you ever hear one of them say anything about him being mentally retarded? Not one word.

Then, we brought you Jackie Howdeshell, She told you how that Johnny Penry followed her and came over and asked her to marry him, and dropped little hints about rape that is going on, break-ins, break-ins, rapes. Scared her. Scared her. She didn't know what she was dealing with, and she come home and finds out that somebody has been in her house, and she didn't know who.

And, then, Captain Cook took the stand, again, and he found out who had been in her house. He found out who had been scheming and plotting and thinking about coming into her home. He went there to see Jackie, and he thought she might be hiding in the house, and he knew that she had a nine year old child, and he cut the screen and went into her home. For what reason? For what reason? [1835] Read State's Exhibit Forty-Eight (C). "If it had not been the chick I stabbed and killed, it would have been Jackie or some other chick, but, I don't think it would have been Jackie because she wouldn't have fought me."

Think of the testimony of Dr. Quijano about rapist and how they think. How they look at it. – rapist. The – rapist thinks the use of power, intimidation and pain, dominating another. What does he think it is going to get him? He thinks after he is through, they are going to love him and that is what Johnny Penry thinks.

And, then, the State brought you Diana Koch. The victim that survived her meeting with Johnny Penry, and what Johnny Penry did to her was written on her face, carried in the tone of her voice, and it rang true on her story. You know, you think about what she testified to. Remember that ID? Remember when she identified him from the stand, and she looked around the courtroom, there he is. Never forget him. He is heavier now, that's him, Never forget him, [1836] because I never let my hair – cut my hair off, never let it grow long again, because of what he did.

And, what else did she tell you about him? She pulls up in her car and Johnny Penry, comes get in the car with her. "My brother, my brother has been in an accident, he is badly hurt, I just need to go down the road. Can you take me? I need to go right away, he is in a red mustang." He convinced this woman, that mentally retarded individual convinced this woman against her better judgment, as she told you to trust him to take him down there to that road, to go to where his brother was hurt. Good story. And, a good act. And, they are going down the road, made some comment about his hair being short, and he said he just got out of the air force, Thinking on his feet. Keep feeding her that line. Keep feeding her that line. Fed her that line. Finally, she is worried, gets too far to call on the CB. She picks it up and the cord has been

cut. Microphone cord has been cut, and Johnny Penry has [1837] got a knife in her side, with his hand on her hair, and he took her out looking for a place, looking for a place alone, and away from other people, and he got upset and her. She placated him, played along, and I think it is pretty clear what would have happened to Diana had she fought him like Pam Carpenter, but, she played along. Took a lot of guts. A lot of courage, thinking.

And, then, he drives though this – finds this place and drives the car through the gate and gets down in the woods and remember what she said he said? What he told her? He looks around, "You can yell, no, you can scream, nobody will hear you." And, then, he laughed, and then he laughed, and he had his way with her, and he used that knife, and he never put that knife down because she likes knives.

And, then, after she has gone along with him, he has decided she loves him, they are going to get married. Think about Dr. Quijano's testimony about the statistic rapist. He is – , he is donominating, he [1838] is inflicting his pain, and now, he is sure that he is falling for him.

And, he gets the car stuck, they get back out, she is wearing that poncho, cape thing, he has got that knife. Two hunters come by and pick them up. Johnny wants to keep her close, he keeps them in the back of the truck. Go down to Signo, that little store, and this tells you an awful lot about Johnny Penry. Think about her testimony. She jumps out and she starts telling these people, I have been raped, I have been raped, he raped me, he raped me, and what does Johnny Penry do? Does he stand there and

say no? No, he immediately starts saying no, that is my wife, she is throwing a temper tantrum, that is the way she is, that is the way she throws a temper tantrum, that is what she does. Quick, fast thinking on his feet. Making up a story. Could you have thought of that in that situation? Could you have thought that quickly?

And, then, when that didn't work, when they didn't fall for that one, "Well, [1839] I have got this friend, and I will call him and he will be here in just a few minutes, a thousand dollars just to forget what happened." A bribe. Thinking. Thinking. Always thinking of a way to beat the wrap, and, think about that. That told you an awful lot about this Johnny Penry, this "mentally retarded individual."

And, then, we get the confession, in from Captain Maurice Cook, and Johnny tells him about the rape and then, finally, who do we hear from? We heard from Warden Sanders Estes, who has been in East Texas, who has been in corrections for over fifteen years, dealt with thousands upon thousands of convicts, spent much of his time at Ellis One Unit, a maximum security, and dealt with Johnny Penry in the most maximum secure area of our penitentiary, and what did he tell you about him? He was down there with a board broken off, threatening people, Sanders Estes went down there and had them roll the doors and he went in there and took it away from him. What happened when he took it away? What did Penry do? Went [1840] for his right pocket, and "I grabbed his arm and I twisted it behind his back and I reached in his pocket." And, what did he have? A shank. Razor blades melted into a toothbrush handle. Great weapon. Flashing weapon. Cutting weapon, sharp edges.

Johnny Penry. And, he knows Johnny Penry, he has been with him, been with him from sometime in 1980, right after the killing of Pamela Carpenter to 1985. knows him. What did he tell you about him? He can read and write, he can understand me, he can follow the rules, if he wants to. When he wants to. No problem understanding him, no problem he understands me. You know, the only one of those doctors that said anything about having any trouble with Johnny understanding him or Johnny reading and writing, was Lt. Grant. When did it happen? About 1989, when he got all of this publicity about being mentally retarded, suddenly he had trouble understanding, he had trouble reading and writing. Manipulator. Manipulative.

[1841] And, that was the State's case in chief. What we got? We got Dr. Fason's testimony, from the first part of trial. Yes, he could act deliberately, he acted deliberately in this case. You look at what he did, how he carried out the attack on Pam Carpenter. He thought about it. He thought about it for three weeks, and he decided that he would go over there. And, what did he do? Did he go wandering up to the house? No, he circled the block, scoping it out, and checking it out, see what is about, seeing what he had to worry about, planning, scheming. Two cars parked. When he went to the door, and knocked on the door what did he do? "Is your husband home?" Pamela Carpenter made a mistake, she said no, and then, what did he say? "What are you doing here? I came to fix the stove." Planning, scheming, working for a way to get into that home, working for a way to get what he wanted. The criminal mind, the criminal personality. There it is.

And, he got in that home, then, in [1842] his own words, he tell you, "I knew that if I went over and raped her I would have to kill her because she would squeal on me and tell the police, and I didn't want to go back to the pin." Thinking, plotting, knowing what he was doing.

And, after he raped her? "I decided to stabbed her with the scissors she stabbed me with." He went over and picked them up and he took them back and he drove them in to her. How much more deliberate and ugly and cold and vicious can you get? Its not possible. Its not possible. Deliberate.

Future dangerousness. Everyone of these officers have dealt with him tells you about him being a future danger. His actions tell you. His stalking of Jackie Howdeshell, his attack on Diana Koch, and that act that he did to Pam Carpenter. That tells you what he is, what he is capable of, and oh, so clearly what he would do again if he got the chance, because the testimony of those officers tell you pretty clearly, nothing has changed from Johnny Penry. You put him in the penitentiary, he [1843] is still dangerous, he is still getting weapons, he is still stalking, because that is the way he is.

Like I said, Question Number Three, three questions, three answers, and they are all yes.

So, what do we have in response to that? Lets look at the Defense case here. Lets look at these mitigating factors, these mitigating circumstances that should convince you to lessen his personal responsibility for this crime.

We heard from the family, we got the pictures of the scars to the leg. I was looking through this earlier. We had

all of this testimony about the scars and the beatings. The only scar on Johnny Penry's back in 1979, was the wound that Pam Carpenter put there when she tried to fight him off, close up, but, we got the scars.

Then, we had Belinda Anderson, the sister who hadn't testified before, and it comes down to some horrible, horrible things that she told about. Even if half of them is true, it is a bad, bad state of affairs, [1844] but, lets look at some of the things she did say. Little Bastard. Mama called him a little bastard. Again, again, we heard that. The room smells. The room smelled horrible. Room smelled bad. Played cards with Johnny. He is retarded. And, it is funny, I think that every time they ask the family, every time, is Johnny mentally retarded, yes, Johnny is mentally retarded, he can't read and write. He has corrected that.

Also, she told you about the horrible things of abuse, beatings, she told you a story about making him drink his own urine. Trudy went and got the glass. Trudy is it. I was real young. And, then, on cross examination, when she was asked about Johnny's behavior, about his violent behavior, her answer was, I was too young, I don't remember, I don't know. I was too young, I don't remember, I don't know. Remember the abuse, but, she doesn't remember his violent behavior. She hasn't visited him in the last ten years. I don't think she has seen him since he was what, fifteen or [1845] sixteen years old, I believe. Hadn't been around him.

Then, we heard from Trudy Penry. She also testified before, the room smelled, she called him a little bastard, marks on the back, marks on the back, scars, beatings,

and yes, she told about his drinking urine, but, it was a totally different story than the one that Belinda Anderson told. She didn't seem to remember the one that Belinda told. Said Johnny was never intentionally mean to his brother. Her previous testimony, that she had made under oath in 1980, she couldn't remember talking about Johnny's violent behavior, wasn't sure of everything, I think it was, she kept saying. She didn't remember his violenct act toward his brother. That, she testified to. She couldn't remember his behavior problems in school, and at home, that it caused them all trouble. She doesn't remember Johnny Penry peeling the skin off his little brother's feet, Jesse Penry, the brother. Johnny wasn't mean, and violent. He only hurt me a couple of times, and he always apologized. Oh, yes, he did [1846] peel off the skin from my feet, but, you know, what we found out was the next witness, a couple of witnesses after, didn't tell you about his brother trying to – him, when he came back from Mexia State School, did he?

And, one other thing, that really hit me with Jesse, was, we didn't hear anything about how bad that room smelled.

Lucille Anderson and Jesse and Trudy all, said that he was retarded that he couldn't read and write.

Lucille Anderson. A lot of her testimony was, particularly on cross, was I don't remember, somebody told me about it, somebody told me about it, I don't remember the arson, I don't remember going to Harris County and making this report, when he was under charges for arson, to try to help him. Don't remember that. That was thirty

years ago. Did she testify anything about the smell in the room? No.

Patsy Fuller. He is retarded, he can't read or write, mother worked nights, and Belinda Anderson said she couldn't remember [1847] her mother working at night. The aunt said yes, the mother worked at night, Daddy worked during the day, and she also said something I thought was interesting. She said, Johnny's mother wasn't always hateful to him, she was nice to him sometimes. She also said, yes, Jesse told us about Johnny trying to – him, have anal intercourse with him. She also talked about him, yes, we told them there about Johnny had problems with wandering out at night, that is why we locked him up at night, breaking out the windows, going out and wandering out in the neighborhood. Just trying to protect him, taking stuff out of his room so he wouldn't hurt himself. They were worried about that. And, yeah, we told them about aggressive, hostile, and hot he cut and polked others at school with scissors. Boy, does that ring out in this case. And, that didn't come from Mama, that come from two aunts that testified to you, and his sister that testified to you, had told about Johnny Penry's violent behavior, told about it in 1973, told about him cutting and stabbing [1848] other kids with scissors, told about him being hostile and aggressive. Didn't come from Mama. And, the room smells bad.

Marilyn Barnet, sister. He was normal and then, he became mentally retarded. Little bastard. I think you probably notice sometimes in there she talked about things that people told her. Hearsay. We didn't object because you all need to hear it all and weigh it all. You need to have everything you can in a thing like this. We

let it go. No smell. She lived with them, she had been in that house, came over all the time, didn't smell that room.

Then, we heard from Mrs. Johnson, the neighbor who had her moment of glory on the stand, who listened to weeks and weeks of screams, came down to one or two, three, sat there and listened and I kept trying to get Mrs. Alnee to come over, and she came over and drank coffee and ate cinnamon rolls and listened to it start. Went over there. Where is Mrs. Alnee? Both sides have subpoena power. Mrs. Alnee, she can tell you she supposedly called Child Protective Service. [1849] She went into the house with her. Where is she? She didn't see anything, she just heard things.

Carolyn Ward. She was there. Made Johnny sit in one place, locked him up, twelve and fourteen hours. I never did figure out exactly how she knew it went on for this longer period of time. We asked her about the room that Johnny stayed in. It was cluttered. Anything else unusual about it? No. No smell.

You can understand the family, you can understand the Penrys, what they want to do, since none of them, has been to see him, since none of them have been to see him in prison, visit him, spend time with him. They came up here, Trudy Ross and the aunt that testified at the previous trial, along with Johnny's mother and now they are back again. Memory improved in some regards, memory not so improved in others.

And, then, we heard from Jay Randall Price.

BY THE COURT:

[1850] You have used about thirty-five minutes.

BY MR. WEEKS:

Thank you, Your Honor. Jay Randall Price, what did he tell you? He told you a lot of things. Talked about this Halstead Test, he only gave nine out of the ten, didn't give the MMPI, no relation.

He did say this, though, no relation between mental retardation, brain impairment, and the rape/murder of Pamela Carpenter. Mental retardation, brain impairment. Doesn't mean he can't blame Johnny Penry for capital murder, and then, we went through these records that he only had selected portions of. We found out about the fire, the arson, the fighting, the setting fire to a patient at Rusk State Hospital. Johnny Penry did it. Aggressive, hostile, fighting, arson. Johnny Penry, upper mild on the retardation test. He also told you that he spent eleven hours, he could communicate, talk back and forth, I could understand him, he could understand me, you know, they spent eleven hours together.

[1851] And, you know, that is the one thing that really struck me about his testimony. He is the only witness that they put on this stand that has spent any time with Johnny Penry since back when he was what fifteen, sixteen years old? The only one. The only one that has spent any time with him in the 1980's and he spent eleven hours, and his semi-blind analysis, yes, it would be very helpful to know about anti-social behavior, but, I don't think that it is important. I think the medical tests were important, but, they didn't show anything, so, they don't mean anything.

And, this damage is to the entire cortex of the brain, and remember what Dr. Quijano said when he was asked,

well, what would you have if you had a brain damage to the entire cortex? Oh, yes, that is possible. You would have a vegetable.

He couldn't find anything, he couldn't find anything physical, so, he made reality fit his tests. Instead of seeing how his [1852] tests messed with reality, instead of seeing how this man can function. I don't think he ever said that he was an expert in mental retardation. He talked about that DSM3 alot. He didn't mention the second part to identifying somebody that is mentally retarded, and that is their adaptive skills, looking at their adaptive skills.

And, then, they read some things to you into the record. They read you some letters, and one of them, kind of hit me. They read it to you, I believe Mrs. Lieb read this to you. "Dear Mrs. Penry; Thank you for your letter of recent date in regard to Johnny." And, then, it went on about the desire to take Johnny home. In here, in these Mexia State records is a letter from Johnny Penry's mother. Now, we heard a lot about her, the horrible person that she was, and yes, she had problems. You know, she did bad things to Johnny, but, listen to this letter.

"Dear Mrs. Parker: We were up there last Sunday, and as you probably already know. [1853] Sorry we didn't get to see you as I had wanted to talk to you concerning Johnny, but maybe we will see you next time. Mrs. Parker I told Johnny that we would be up there in two weeks, and, if we could, we would bring him home for a little while. He wanted to come home so bad, which I know is only natural. I would like your say so in this matter. We would love to bring him home for a couple of weeks, but

we don't want to do anything if you think it might hinder him in any way. We want to do what is best for him. Please write and let me know what you think in this matter. Johnny had very good remarks on the school and seems to like everyone there. I can see that Johnny has improved a great deal, and it made us very happy to see this. You have a wonderful school there and we always want to do what you think is best for Johnny's welfare. If there is ever anything at all we can do to make it better for Johnny, please don't fail to tell us. Please answer and let me know what you think about Johnny coming home."

[1854] There is another letter in here from the mother, I won't read it to you, but, there are two sides to that story, and what did we put in rebuttal? We have heard all of this testimony about child abuse, and we have heard Dr. Price on mental retardation. Dr. Quijano, came in here an expert in mental retardation, a man who set up the mental retarded program in TDC, which it is clear, that Johnny is not a part of. He talked to you about mental retardation and what you have to have. State laws, and this diagnostic and statistical manual that every one of these people have cited, too both said before you can make a diagnosis of mental retardation, you got to have two things. You got to have an IQ score which measure academic ability, a sub-average score there, which apparently Johnny has. Pretty clear.

And, you have got to look at adaptive skills, survival skills. How does he get along in the world? How is he able to deal with people? How is he able to read [1855] people? What have we got here? Reality. Take the test, and then, see what the reality is and put them together to

see if you got retardation. And, he put them together with Johnny Penry and what did he tell you? He is not mentally retarded.

And, I think when you go back through there and you think about that testimony and you think about what he did with Diana, and Pam, that is not the act of a mentally retarded person. That is the act of someone who can think and reason and act on and he did, for his own purposes. He follows the rules when he wants to.

Talk about that brain impairment. He said that you have got to look at the function in real life to make that test mean anything. As a check on that test, the MMPI is very important. That is the best test, seeing if somebody is motivated, faking, if they are malingering, and it wasn't given.

And, then, we come to the testimony about child abuse. Child abuse. There is no connection between child abuse and criminal acts. No connection. And, he speaks from [1856] good experience. Remember what he said? I came from an abused background. My father was an alcoholic, he abused me. He also said that his father loved him. He loved him and abused him. Counsel asked him, well, you have heard all of this stuff about Johnny Penry. Don't you think he had a worse time of it than you did? And, what did Dr. Quijano tell you? It is too close to call.

We make choices in life, we make decisions in life, and we go one way or the other. Dr. Quijano made his decision, Johnny Penry made his. Criminal mines.

Then, he talks about the anti-social personality and the rapist, the power rapist, the angry rapist, the sadistic rapist.

The sadistic rapist. Dangerous. he will do it again and again. Anti-social personality, and then, he said it was more likely than not, Johnny Penry will commit acts of violence in the future. What did he say that he had to look at? Had to look at whether he was anti-social, and along with that, he is making that work with the fact that he is a rapist, he has [1857] anti-social personality disorder, he is a rapist. You got to look at the act of the Defendant before the crime, the planning, the pre-meditation, the forethought, the working it out, and we got that in both cases, folks. It is there.

Then, you look at his acts after. Did he attempt to help her? Did he show remorse? Uh-huh. "The chick I stabbed." The chick I stabbed. The chick I stabbed." Again and again. He really cared, didn't he?

This cover-up. Changing his clothes. Just so happened, that Officer Nelson snapped to that description and got Johnny Penry, otherwise, it would be a pretty good deal. Otherwise, that cover-up may well have worked.

And, then, you look at the condition of the person that has been changed, and he has changed, has he? Has he? The only person that you heard that has been with him for the last ten years made it very clear that he hasn't changed. He is no different. He is the same. He is still [1858] manipulative, the same. And, then, the crime. Deliberateness of it. We got that. He is street wise. Street smart.

Dr. Samenow, closed, and he said, that you got to look at the adaptive skills, Tests don't mean anything if you don't put them into reality. If you don't put them in reality, it is nothing but numbers. Adaptive skills. And, in this case, it was used for evil. Remember telling about some of the things that he read in the report, how this abused, how he used mental retardation as an excuse when he broke a sink in TDC? "I shouldn't have to pay for this, I am mentally retarded." Excuses, excused. Again and again we hear it, but the crime resides in the minds of the criminal.

You know, we have heard for years, society's fault, it is our fault, mother's fault, father's fault, somebody else's fault, I had a bad childhood, I had a bad this, I had a bad that. When does that come back to individual responsibility? When does it come back to the fact that [1859] we are responsible for what we do? It is time that Johnny Penry took responsibility for his acts and he has shown that he understands and he reasons and he deals with things.

And, Dr. Samenow and Dr. Quijano, there is no connection. Mental retardation, actually more likely to be non-violent than violent. No connection with child abuse and violence. And, I think it is interesting that we had all of this testimony about child abuse but we didn't have a single person, not a single expert, a single person in that field, a single person that deals with child abuse, a single one of them except for the expert people that we brought to you, to come up here and tell you anything different, because that is the way it is, folks. There is no connection. Simple.

And, something else I noticed with Dr. Samenow. It is sort of an old term of art in our business, if you can't go after an expert any other way, go after his fee. Lets face it, folks. J. Randall [1860] Price was paid, Dr. Quijano was paid, Dr. Samenow was paid. So what? If you don't have any other way to go after him go after them that way.

Five books. He got asked about three sentences out of five books. No child abuse expert, nobody that has been with him the last years. It is not there.

You know, on voir dire, Mr. Wright, talked to you about you got to have an idea of the whole person, you got to have all of the evidence, you got to consider all of the evidence, you got to know what you are dealing with, and what did they bring you? Selected experts, bits and pieces. An expert who hadn't looked at everything, and they want you to make a decision. That's why we let you hear it all, the good, the bad and the ugly.

You got an important decision to make, but, look at the evidence. Look at Johnny Penry. Look at him. And, you know something else? All of these reports that they read to you about his mental retardation and the reports and stuff? You know that [1861] hit me again and again and again throughout all of these reports? Is the people always talked about his ability to improve his behavior. They talked about his ability to improve with help to function better with help, to read and write better with help, that he could improve himself. Nobody wrote him off, none of those people ever did. Yes, he had a bad education and a bad childhood, but, what does that come down to in the end? That he was abused as a child? You can have sympathy and you can have compassion for the

child was Johnny Penry, just as we have sympathy and compassion for the child that was Dr. Quijano, but, does that mitigate his punishment? Does that change it? No, because you are instructed that sympathy you got to based it on the evidence, it has got to be tied to this case, and it has got to be tied to his personal culpability.

And, did you ever, ever, ever, ever, in your entire thing, hear one thing that connected any of his background to the [1862] crime that he committed? No. Not one bit. It was designed to tug at your heart-strings.

You know, when you think about victims, I think about Diana Koch. I think about Pamela Carpenter. I think about the victims that almost were, Jackie Howdeshell. I think about the victims to come, that are coming that he has shown they are coming.

You got an awesome responsibility and awesome duty, and a duty it is, and what is duty? Duty is to do what is required, what is necessary. To follow your oath, the evidence and the law. Just as Diana Rearden came to you and did her duty, and opened up that cold, ugly part of her life for you, relived it after fourteen years, she did her duty.

Pamela Carpenter, stabbed and died and bleeding, did her duty. She made certain that her killer will be caught, so, he won't hurt another.

And, now it is your duty to make a decision in this case, and based upon [1863] the evidence in this case, the answer to each of those questions is yes. Yes, it was deliberate. Yes, he is a danger. And, yes, there was no

provocation, and there is no mitigating evidence to mitigate his personal culpability, to mitigate against his responsibility. Child abuse, mental retardation, mental impairment, didn't do this to Pamela Carpenter. Johnny Penry did. Go back and make your decision. It is in your hands. Think about it, think about the evidence, think about him, and when you do it, and I think you will find from the evidence that there is only one choice left, and that is to answer each of those questions yes and let him take the responsibility for what he is, what he has done and the choices that he has made. Thank you.

BY MR. SMITH:

Can we have a short break?

BY THE COURT:

We can break now or break in part of your argument?

BY MR. SMITH:

* * *

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

[51:1865] BY MR. SMITH:

Yes, Your Honor.

BY THE COURT:

You can proceed.

BY MR. SMITH:

Ladies and gentlemen. You probably know Judy Lieb and I have been guest in your community for a couple of weeks, a little more now. We were a little like anyone coming to a new place, I guess, we were a little apprehensive when we first came about how we would be received. I think maybe my friend, Joe Price, is a little hopeful that our reception wouldn't be too good, because I know it was me that he was pointing at in the guilt/innocence summation and took his yellow pad and said, "We will not be intimidated." So, I tried not to be too intimidating today. I admit that I raised my voice to a few witnesses yesterday, but, I think but for that, I haven't been too bad, and we certainly, my colleagues have been absolutely delighted to be in this community with the reception that we have got. Never [1866] seen so many nice people collected in one place. I guess that's because I come from a town where not everyone is nice, everyone is nice all the time, and we particularly met nice people in this Courtroom. I want to thank Judge Dean for his many courteous' to us and I especially want to thank Joe Price,

even if he did point at me. He and his colleagues have been very gracious to us everyone on our side and we have got the best kind of treatment that we would have asked for. I need, obviously, to thank the jury. Thank you. I think what I thank you for especially is the real dignity and seriousness and your attention that you have brought here. Very, very serious case. I know it is going to be.

You heard, you remember the arguments on the Guilt/Innocence Phase, in the case. That is the last time that we really got to talk to you. We have been talking in front of you since then, the last time, anyway, I talked to you, and obviously, we accept your verdict on the guilt/innocence, [1867] on the guilt of this Defendant. The evidence is there. You are not going to hear us re-arguing. We think that this stage of the trial, is very, very different. One of the differences is that you will not hear us talk as much as you heard Mr. Wright talk about proof, this burden of proof at this stage of the case. I will remind you, and I don't mind telling you, the burden of proof is exactly the same thing as it was, the State still has to prove beyond a reasonable doubt everything that it has to prove, but, I am not going to talk so much about that here, because to me, the burden of proof isn't going to turn this case. You are not going to decide this case on burden of proof, not going to decide the punishment on burden of proof, you are going to decide on what the evidence shows.

And, what I am going to say to you, ladies and gentlemen, is that the evidence shows that this is not the kind of man you kill. I say that knowing you found him guilty of an absolutely horrible crime, [1868] and the strange proof was produced, which I am not going to

argue, a horrible and frightening rapist. What I am giving you is a choice on this stage of the trial, is between the Death Penalty and Life Imprisonment. I am going to keep reminding you of that all the time I am talking. It is very, very important to understanding what I am saying to you, that no one is saying that you don't have the power not to punish him. No one is saying don't punish him. No one is saying forget about it. No one is saying, don't punish him very severely. Your choice is between the extreme penalty, the death penalty, the ultimate penalty in the law, and the other choice is life in prison. That is the choice that you are making.

I do want to try and help you put it a little bit in perspective. See what the death penalty is, and of course, I am not going to stand here and make a speech against the death penalty. There are cases in which it is the jury's duty to impose the death penalty. I am [1869] here to tell you that this is not one of them. The way I want to give you an idea of what it means is this. Take me. Forget about Johnny Penry a minute. It is me. I am not mentally retarded, and I have – I had a very good childhood, I got no mitigating factors for what I am doing. Suppose I pick up a knife or any kind of a weapon and I walk over to Judy Lieb, cold blood, for the worse motive, and in plain site of all of you, I cut her throat and kill her? It might surprise you to know that, ladies and gentlemen, that for the crime that I just described, you could not give me death. That crime is considered too mild a crime in the eyes of the law to deserve the death penalty, because it is only a murder. It is not a capital murder. You have a capital murder here it is a murder combined with a rape, and that does make an awful crime, but, I am saying to

you that the death penalty is not something that you can throw around. The death penalty is reserved for the very worse, not just the [1870] very worse crime, but, the very worse criminals, and what I am saying to you, is that for this man, this case, life imprisonment, is enough.

Let me just give you a preview of what I am going to say to you, what I am not going to say to you. First, I am going to talk to you about what the law calls mitigating circumstances, and things that don't excuse a crime, they make the criminal's guilt a little less bad, and I know I sound like a broken record, but, that is all I am saying here, is about the mental retardation and the child abuse. They don't make the crime not bad, they don't make him not guilty, they don't entitle him to forgiveness, they don't entitle him to be free from punishment. All they do is making it a little less bad, that is the difference between life imprisonment and the death sentence.

When I talk about the mitigating evidence, I am going to talk specifically about the special issues that are before [1871] you and first I am going to talk about the deliberateness and I am going to argue to you that the State has not proved deliberateness here beyond a reasonable doubt. The evidence just isn't there, and that I want you to understand now, that is a different argument, a completely different point from the mitigating evidence that I talked about.

What I am saying here is they haven't proved the deliberate crime, they haven't proved a deliberate crime, a crime committed cooly, thoughtfully, not in hast. They haven't proved that kind of a crime and you must answer that Special Issue, that first Special Issue, no.

What evidence is mitigating evidence you would have to answer it no, even if he didn't have anything about the mitigating evidence.

I am going to argue on Special Issue Number Two that the right finding is Johnny Paul Penry, in prison will not be a dangerous man, not the kind of a danger that you should answer yes, to Question [1872] Number Two. He is not.

Obviously, I am not going to argue Question Number Three. I am not going to say Pam probably provoked him where the death was unreasonable. I am going to come back at the end and talk a little about my client.

Okay. Mitigating evidence. The last time I am going to haul out my hand-written sheet here. Johnny Paul Penry is mentally retarded, and the State is trying to prove that he is not. Really, just trying to prove something that you can't prove, because he is a retarded man. I am going to get to it, I can hear, he is not saying it, I think Joe Price is saying behind me, so, I am going to get to that question, but, first, lets get it straight. Lets get the facts straight. They have been testing him since he was a seven year old boy, and he has never showed up anything but mentally retarded. How many kids seven to nine years old, don't do the best they can when they are tested? How many kids who aren't retarded, get [1873] sent to the Mexia State School for the retarded? He is retarded and the fact that he can talk to you, you can talk to him, which many witnesses have said, doesn't prove that he is not retarded, and there is no credible proof, that he is anything but retarded. They say that he wasn't trying on those tests. That is not the evidence. They go back to

when he was seven years old, all over the record, one of the many pathetic things in this case is all the documents say Johnny tries very hard. He can't do it, but, he tries very hard.

How did he get to be retarded? We don't exactly know. His Aunt Marilyn has an opinion how he got retarded. She thinks his mother made him retarded by hitting him on the head with a shoe when he was four years old, and then, I suppose it really doesn't sound very likely because the mother hit the four year old boy in the head with a shoe to cause the kind of brain injury that makes a kid retarded. Even if she lost her temper and hit him hard, it wouldn't [1874] do it. It is too strong. If a woman gathered all of her strength and went like this, maybe that could cause it.

We don't know why he is retarded. We do know that there is something wrong with his brain in the way that his brain works. Randy Price, I thought, was an honest, convincing witness. He told you in great detail, exactly why he says that there is something wrong with the brain. An old injury, not something that you can spot on the medical tests, but the brain doesn't work right. I am not going to go through the details, it is there. There is something wrong, with this person's brain, and of course, we are going to – there is evidence, there is evidence indeed, I think Mr. Price will tell you that when you say a child is retarded, you should say, mildly retarded. So, lets say that he is mildly retarded. Mildly retarded. I think some of the evidence says, mildly retarded, in the sixties. Some of the older scores are way down below the sixties, even below fifty-five, maybe the threshold. That is the so-called [1875] moderately retarded rank, but, I think the

evidence suggests that those scores were low. Why do you think they were low in Johnny's childhood? Why do you think he is even less capable, even less able to function? But, lets say, mildly retarded. What does it mean to be mildly retarded? Mildly retarded is a misleading pair of words. There is nothing mild about the problem.

You know from Mrs. George, the lady from Mexia, who Judy questioned late last week, that the most the mildly retarded person can look forward to is a life of very simple, manual labor, or under very strict supervision, and got to be a frustrating, confusing life being mentally retarded.

Mildly mentally retarded, maybe I suggest that Dr. Quijano, maybe it is even worse being mildly mentally retarded because you just might not go, that you are way down there in the bottom one percent looking up to the rest of the world and it is frustrating.

[1876] And, I guess I will say to you that it is one thing that you have to consider. Frustrating to be mentally retarded because it is more frustrating as you get older, because the body grows up and your mind doesn't, and you got a person with a mind of a child, the body of a young man, and here, tragically, we had the person with a mind of a child, and I don't know why the Lord does it this way, but, in the mind of a child, the strong body of a young man, the sex drive a young man, what a combination. And, I am not saying, I am not saying, I told you that I would repeat it, but, I am not saying that excuses what he did. I am not even saying it explains what he did. If fact, I am not even saying that it is the

biggest mitigating factor in this case, because it is not. The child abuse is. It is one reason, let me explain the difference, it is one reason why I think you can say Johnny Penry, listen to what happened here, but, I can hear Joe Price, I am going to have to alter the argument, I am going to be stepping [1877] out of character and pretending to be Joe Price, because he is entitled to speak after me, and he can answer what I say, and after he sets down, I am not allowed to get up, I can't answer a word that he says, so, I have to try to expect what he is going to say, and sometimes maybe I will be right, and sometimes I will be wrong, and if he says something I didn't expect and that I haven't answerered, that I am going to leave it up to somebody in the jury room, to make the answer for me, but, one thing is quite clear, like you to say, plenty of mentally retarded people that don't go around acting like this. Great majority of the mentally retarded people never get near any crime like this, and he is perfectly right. I am not saying don't punish him, but,nevertheless, he is right.

The most – my picture of the most mentally retarded people probably is a fair picture. Most of them are sweet natured, very harmless people, they need a lot of help, but, they are not hard to take care of. I must say in the record [1878] that you will see flashes of time, you will see that Johnny Paul Penry was that way some of the time, but, God knows, no one is ever going to forget what he was.

Why is it that most mentally retarded people are able to act somewhat nice? Well, mentally retarded children are called special children, and his parents and their parents know this, both parents know that they are special and give them special love, special help, and usually

it falls to the mother to do that, more to the mother's special care of that special, healthy, vulnerable little child. And, when you – when they get that special care, they are going to be okay. They can live harmless maybe sometimes happy lives. Even though, they certainly have to live with a lot of frustration and unhappiness, they can be okay.

Johnny Penry had a different kind of mom. See these? Pictures, Penry Family Album, not real pictures, but, starts with a child of nine or ten months old, very few days, happened to be a favorite, children [1879] some of them walk, some of them can't because they are small, and pick them up and put them in the high chair, and they say often times they can begin to feed themselves, but, of course, often they haven't mastered it, and they smear it all over their face, trying to get the spoon in their mouth. This is Shirley Penry, his mother, she goes like that. Johnny is not Marilyn, she told you that, and when Mr. Weeks summarized the testimony on child abuse he tried to find something to say about everything, but I think that is one he skipped. You think they were making it up?

Next change in life, two year old baby. Alright. Maybe it is two year old is not a baby, maybe two years is not very big. Motheris bathing him in the sink, but,she got one reason or another she scolded him with the hot water and he is scarred. You saw in the photographs that was admitted into evidence the scars. The scars are there to this day on the back of his legs.

[1880] Now, talking about these scoldings in hot water, we have all probably had the experience of taking

– or getting the shower a little too hot, and put your hands in the sink when it is too hot, or pull your hand out or you jump right out of the shower. Just think for a minute about someone much, much bigger than you are, holding you in there. That is the kind of mother Johnny Penry had.

Of course, she told at least a couple of people, Johnny did it to himself. She left him in the sink he turned on the hot water himself. Remember the baby sitter, Carolyn Ward, who testified? She was maybe a fourteen year old baby-sitter, when these things happened, she didn't see it happen, she saw the injuries and she thought it was kind of funny that the injuries were on his back. How do you turn on the hot water behind you? She admitted, mother admitted, her own sister if I remember it right, Aunt Marilyn, she admitted that she did it. [1881] Said, oh, oh silly me, and according to Trudy, just a little girl herself at the time, she remembers it, she thinks the mother did it, she didn't make that up. Anybody, anybody, in the world that we have got, who thinks that she scolded him on purpose in the sink. Mr. Weeks showed you that picture of Johnny's back when Johnny was arrested and showed the scars weren't there, and I suppose what he is trying to say to you, that the scars that you saw in the picture are more recent, but, if you compare the two pictures, the scars are further down on his leg. The picture when he was arrested, didn't go down that far, but, the scars were there.

I am reading from State's Exhibit Ninety-Nine (A), Page 16 of State's Exhibit Ninety-Nine (A), and it is a little write up that the Mexia State School did when

Johnny Penry first came there in 1969, when he was twelve years old.

"Soon after mother's return to the home, subject received severe burns on the lower part of his body." That is, "returned to [1882] home to mother, the mother reported that the child, she was bathing him at the kitchen sink, she left him alone for a short period and he turned on the hot water. He now has severe scars on his legs."

Those scars were there when he was twelve years old, but, let me read another sentence to this, read it again. "The mother reported that while she was bathing him in the kitchen sink, she left him alone for a short period and he turned on the hot water." The mother's report. That is what the mother reports. They didn't believe it. No one believed it. She did it on purpose.

Well, then, he gets to be four years old, and this is when Aunt Marilyn thinks he was hit with the shoe, and she thinks it left him retarded for life, and we have other, other horrible events we can't put dates on. The child was made to stand against the radiator until his legs blistered. That was what Trudy told you.

We have Aunt Jane, coming to visit, try [1883] to do something, interrupted by screams, and running to the screams to see Shirley going like this with an extension cord on her little boy's head, but that is just the time she saw it. We know from the testimony that there were a lot more days that she beat him that she didn't – she beat him with anything that came to hand, or she would claw him with her fingers. She would kick him.

And, others came. Belinda talked about she is sitting on the toilet in the bathroom, she is watching her mother and Johnny in the bathtub, and her mother is holding him under the water, hollering I am going to drown you, you little bastard. She didn't, she did something, and that is about not drowning him that time, about the nicest thing that we have any record of his mother never did that any more, that the mother never did for him.

Another scene, from his life, the mother had a great big butcher knife coming after him and screaming, at the child and Trudy is in her room watching and she is [1884] screaming that she is going to cut his penis off because he wet the bed or some other crime and Johnny thinks she is really going to do it, and Trudy thinks she is really going to do it, and I think the evidence is, she would have done it if she hadn't been stopped, and stopped by John Garner Penry, Johnny's father.

I think Trudy's testimony was alarmed the only time I ever saw my father hit my mother with something.

On cross examination, Joe Price asked a lot of questions about John Garner Penry when all three of those kids got up on the stand. You mean, your father doesn't know? How could all of this be going on if your father don't know? And, everyone of them said, oh, no, Daddy don't know. Daddy didn't know until much later. Daddy never knew. That is what they said. That is what they believe. Got to believe that, got to have one parent who didn't – well, you know what I mean. You got to believe it. If you don't believe it, it doesn't much matter whether anyone believes it, it [1885] matters now, whether John Penry knew about it. I don't want to say anymore, I want

to leave that on him, when he protected his little boy from his mother.

So, that is child abuse. No, no, no. That is a mild child abuse. That is physical abuse, kicking, scolding, trying to drown him, waving butcher knives, that is brutal abuse, and I guess, though, I don't know, I guess that sort of thing is what Dr. Quijano was talking about in that very moving testimony. I didn't know it was coming, I don't think anyone else did, either. Yeah, I was abused, I think I may have been abused as bad as he was, and you remember I have been sort of yelling at Dr. Quijano, and I jumped all over him, because I don't think he knew what he was talking about when he was talking about a Halstead and trying to pretend that he did know what he was talking about. I was yelling at him a little about child abuse, too, and then, he said, that, so I stopped yelling, pretty fast. I got abused, too, and I think it was maybe as [1886] bad as his. I don't know if I could really believe it was any worse, but, I did ask Dr. Quijano another question and I said, well, did your parents love you? Yeah, but, beating me, my father, I don't think he meant to, but, my father treated me awful. He was a loving father, both of my parents loved me. That helped? Yeah. That helped.

Johnny Penry's mother hated him, hated him. Hated him with all the passion that a normal mother puts in love to her child. She hated him.

I got some mother unhappy scenes about life. Her name for him was little bastard. We know from the evidence that she meant the name the name literally, because he was an illegitimate child, or believed to be. You might expect that from the father, not the mother, the father's

child, but that is not the way it worked in this family. She obviously, felt some kind of a horrible guilt, bitterness or shame that led to Johnny being born. She took it all out on Johnny.

[1887] People have different nicknames for their kids. I have a thirteen year old my favorite nickname for him is you ugly creep. He loves it. He loves it when I call him that because he knows I think he is handsome, and he is the nicest looking boy in the world. He probably is and nothing wrong with that kind of affection, but, I don't think, little bastard was that kind of name, but, I don't think little bastard was that kind of a nickname, and I think, little bastard, was a little bastard. I am going to drown you, you little bastard, that kind of thing.

Pick up in life, and the evidence showed that she kept him locked in his room for self-protection. Maybe she said she did, maybe there were times when he was locked in there for protection, but, I understand a retarded child does need special protection, at night understand, locked in the room, but she kept him locked in there all day, let him out when Daddy came home, let him out when neighbors came over. She did it because she hated [1888] him. She did it out of sheer spite.

Toys. I would sense that a mother is a most loving person even parents that abuse their children, they may not abuse them, they might let them play with toys. Toys for Johnny was something that the mother broke over his head. Remember the little mop and broom, that his Aunt Jane brought him? Jane didn't see what happened to it, but, Trudy, I think Trudy or Belinda did, got broken over his head. And, the next time Aunt Jane came to visit, she

brought him another toy. A little doll. When she put it in front of Johnny he looked at it, put it away, they had a little conversation. Finally, gave it back to her saying Mama might break it, Mama might break it. He didn't play with toys in his house. You saw Aunt Jane burst into tears when I put that doll in front of her on the witness stand. There is the doll. It is faded. An old doll, never been played with. You can tell from looking at it. Aunt Jane was not making it up. None of this ever really [1889] happened, it is all made up.

Well, what is his next little picture? Punishment. We all punish our kids, some times. Shirley had a special punishment for a special little boy. She made him drink urine and eat excrement as punishment. There is no reason to do that, except to humiliate the child. She hated him, she hated him. That's all there is to it. And, the testimony is, it happened a lot of times, and the particular incidents that the sisters remember are not the same. We have Belinda remembering the night in the bathroom when her mother dipped the cup into the toilet and forced Johnny to drink it and we have Trudy remembering the time in the car when the little kid peed in a coke bottle and the mother got back into the car and was furious, forced the coke bottle to him. So, you got two different instances, and is that sheer proof that anything like that every happened? It is all made up. It never happened.

Our last picture from Belinda, the [1890] very time Johnny made a mess in his pants, and he is sitting on the floor eat the mess out of his pants, with a spoon while his mother lies on the bed drinking a Dr. Pepper. Why would a mother do that to a child? Because it was the meanest,

most humiliating thing she could think of to do. That's the only reason. But, of course, it is not true. Its made up. All made up. Its all made up. Nothing ever happened. All the witnesses are lying. Two sisters are lying. Brother lied because he was much younger and all he really gave was the bottom line. She treated us all bad but, she treated Johnny the worse.

Oh, Lucille, the old lady. Remember the old lady in the wicked world? Mr. Price kidded her about that on the cross examination. Remember that? Maybe we all smiled a little bit, but, I got to thinking, you know, she is not wrong. It may be a funny way of proving, but, she is not wrong, and she is at the one that told you about it, that blow to the face [1891] in the high chair from Shirley Penry. She's lying. Aunt Jane is lying, lying about a doll. The toy store brought it in. The neighbor is lying. The neighbor came all the way up here to tell you that she heard the screaming. Fourteen year old baby-sitter, she's lying, too. You remember Carolyn Ward? She's talking about long, long ago. She was a kid. You know, sort of realized she was a kid at the time. I'm not sure. Joe Price, why didn't you tell her? I was only fourteen years old, I didn't have the chance to make that, but, she is still ashamed of it. Ashamed that she didn't tell her. She was in tears. She still feels awful about it, but, out of touch with the family for years, got no earthly motive to lie to anyone, but sure, she's lying. It didn't happen. Shirley Penry didn't hit him, etc.

Well, I got hope, and I have got to believe that if some witnesses ever came to the Texas District Attorney of Trinity County to tell them that there was a child abuse going on, there were witnesses like [1892] this, and they

told stories like this, they would get a little different reception. I hope they would, than, those witnesses got on the witness stand. If they didn't God help them, but, alright, don't believe the witnesses, don't believe the witnesses. She hated him. Got proof in her hand-writing. Part of State's Exhibit Ninety-Nine (A) at the end of Page 4, an application to a state school, filled out by Shirley Penry in her own hand-writing, pretty good hand-writing, too, nothing mentally retarded about her. Spelling is not very good, but, the hand-writing is very good. Johnny is how old now? Nine, almost ten. "I'm trying to get him into the state school." I can't find a one kind thing to say about Johnny anywhere in all of this. He will fight, He will set fires. He will scratch, he is cruel to children, and he is destructive. Of course, that is what Joe Price just said. She tells the truth, that is the way it was. Little psycho-path, she wanted to warn those people at the state school. Such an honorable woman, such an honorable [1893] woman, I will be Joe Price again. Words she used about Johnny. Hateful, feared by classmates, hateful, and otherwise the mother is writing about her nine year old retarded boy. I don't care if it was true. Use the word hateful. There aren't other words? She hated that child. No mother who loves their child ever wrote a piece of paper like this.

Oh, there is one other thing, Got a lot of choices in these applications that you can describe here. Submissive or aggressive. Aggressive. He is exciteable. He is stubborn. Happy, unhappy? She circled happy. Yeah, sure. Sure. Sure, Shirley that little boy was very happy. Maybe she thought he was. Maybe that's why she hated him. Maybe he did have some happy moments, and maybe

that is why she hated him, but, she hated him. Well, Shirley Penry has gone, but she is gone, and her punishment and forgiveness are gone with her to a higher court.

So, what does all this have to do with anything in this case, what Mr. Weeks has [1894] already said, and Mr. Price will state it again, oh, nothing, just nothing to do with what happened in this case.

Dr. Samenow said, too, nothing, nothing, to do with the crime, just a coincidence, although, he kind of choked on that word coincidence. You really think it was coincidence? Do you mean, to tell us, Dr. Samenow, that it has nothing to do with it? I don't know what you mean. I don't know what something to do with it means. Areyou saying, Dr. Samenow, that if he had a loving mother as you and I, that he would commit exactly the same crime? Yeah, that's my opinion. I guess it shows what a really smart man with a really hard heart can get himself to believe if he really, really studies, but, that doesn't make any sense at all, and Mr. Weeks is wrong, about one thing, and then, Dr. Quijano said the opposite. Remember when I calmed down a little bit and I said, Dr. Quijano, I know that I am shouting, at you and maybe you agree, but, you are saying that child abuse is not an excuse for what [1895] he did? Right. Did it have something to do with it? It had something to do with it. That's all I am saying. That's all I am saying. It had something to do with it. We don't know what caused the man to commit a crime like this, we know very well, there is no excuse, no excuse on the face of the earth to justify a crime like this, and it is probably true, this mentally retarded man with his horrible history, that maybe if he had been strong enough to make the right choice, could have been better. A lot of

guilt on Johnny Penry's shoulders, a lot of it. I hear a lot about it. I guess, all I am saying is a little bit bad guilt, Shirley Penry didn't kill anyone, she didn't rape anyone, only she hated him. All I am suggesting to you is that you take some of the guilt, not all of it, not most of it, but some of it and take it off Johnny's shoulders because there were some things that weren't his fault, and if you do that, then, the right punishment is not death, it is life in prison. That's all [1896] That's all I am saying, life imprisonment.

Dr. Quijano, some of the most inspired testimony I have ever heard in the courtroom, told you how you can really, it is possible to overcome something like this, possible. But, I said, it was hard, wasn't it? Yeah. But, it was harder if your parents didn't love you? He said, yeah. It would have been harder if you were mentally retarded? And, he said yeah. Joe Price got up and said he never could have gotten all of those degrees and become a psychologist if you were mentally retarded, right? He misunderstood me. That's not what I meant. Getting a degree and become a psychologist wasn't the hardest thing for Dr. Quijano, that was the easiest thing. The hardest thing that Dr. Quijano did with his history of child abuse, is that he grew up to be the decent, law abiding person. I think he knew what I meant. He did it. Inspired everyone in this courtroom. He is a respected member of his community and Johnny Penry was mentally retarded, and Johnny Penry didn't have a loving parent, and Johnny Penry [1897] is sitting here hoping against hope that maybe he will get life imprisonment. There is a big difference between Johnny and Dr. Quijano,

and I guess a lot of that difference is Johnny's fault, but, some of it isn't.

Well, Dr. Samenow said that child abuse had nothing to do with the crime. It just so happened that the little child who was battered and beatened, tortured by the person who should have loved him most, and did every now and then, tell her he loved her and maybe mixed in with the hate, maybe there was some love there.

You know, just so happens that he grew up and committed a crime and just a coincidence that this guy, obviously, has violence and love so mixed up in his mind, that he can't tell the difference. Any doubt about that at all? Remember Diane Koch's testimony? What a dumb question. Who would ever forget Diana Koch. Do you remember her remember when she was very bravely and very skillfully trying to calm him down, trying to save [1898] herself? Johnny loved it like that. Love is violent. And, she went for her own counsel, she did escape a horrible situation with her life. I am not minimizing what she suffered. The problem, of course, Johnny's mother, taught him that love was excactly like that, that is what she taught him. She was very convincing.

Jackie Howdeshell, the witness you might forget, because all of the others were so vivid, and she, of course, was the lucky one. She was the one who could have been a victim but wasn't. She told her how Johnny asked her three times to marry him, and, I only cross examinated her for about a minute and a half, and my voice was so low, she could hardly hear me. Maybe you don't remember it, but, she said, that – I said, was he a gentle sole? I didn't know him well, he seemed nice. Was he looking for

love? He was looking for love. Did you feel sorry for him? Yeah, I felt sorry for him. She felt so sorry for him the first two times, yes, he asked her to marry him, she doesn't bring [1899] herself to say no, I will have to think about it.

And, then, the horrible, horrible Pam Carpenter thing, and one of the most horrible things about it, about that confession, I am going to tell you in a minute that I don't think that you can take every word of that confession as true, but, the one that rings true, just before he killed her, he said, I love you. Just a coincidence, right? Can't you hear the echo of Shirley Penry, Mama loves you, you little bastard. You know, she loved, nothing about this boy's background makes up love and violence, it just happened that way. Dr. Samenow, can't hear the echo. Dr. Samenow, really thinks that he did exactly what he did. There is truth behind what Dr. Samenow is saying, of course, there is truth behind some of it, and talked him into an absolutely stupid idea for a professor to do that. One truth is that there are a lot of criminals who try to get off with phony stories of child abuse, a lot of them. If you went out there to [1900] the Ellis Unit, you would probably, you know, find an awful lot of people telling you about child abuse, and an awful lot of them would be lying, and the rest would be exaggerating, but, this is not a phony story of child abuse, this one is real. This is true here. How are we going to prove child abuse here? And, we have got another sensible Dr. Samenow, and he said that doesn't excuse it, nothing to excuse it, and he is absolutely right. It does not excuse it, all I am asking for is life imprisonment, I am not asking for an excuse.

Dr. Samenow says nothing to do with it, or the present. He doesn't know what I mean, when I am asking the question. He just, in a way, I could say, do you, lets let the case stand on who knows more about child abuse, Dr. Samenow or Dr. Quijano. Dr. Quijano, never wrote anything about child abuse, Dr. Samenow, has written about how much a child provoked, the parent, but, Dr. Quijano, knows more about child abuse, and I asked him if it had something to do with it, and he said yes. Not an [1901] excuse, and it is not an explanation, and he said, that, and he is right, but, it had something to do with it, and that is why I say to you, there is enough mitigating evidence in this case for you to give a life sentence, let me tell you, let me talk to you for a minute about how that is done, because the Charge that the Judge will read to you, does explain that, and it may not be the easiest part of the Charge, you understand, and I want to go over it with you.

It is the part about the mitigating evidence. You are instructed when you deliberate on the questions posed in the Special Issues you are to consider mitigating circumstances, if any, supported by the evidence, etc. You are to consider it. A mitigating circumstance may include but is not limited to any aspect of the Defendant's character and reference or circumstances of the crime, which you believe is a circumstance of the crime, which you believe could make a death sentence appropriate in this case. You find out that there are any [1902] mitigating circumstances in this case, you must decide how much weight they deserve if any, and therefore, give the consideration to them. This is where, listen carefully, I am going to go

slow, give consideration to them in assessing the Defendant's personal culpability at the time that you answer these Special Issues.

You are going to get just three yes or no questions. You are not going to get any questions about mitigating circumstances. Three questions called Special Issues, and none of them say anything about mentally retarded, none of them say anything about child abuse, but, the Judge told you, he told you that when you answer those questions you are to give affect and consideration to mitigating circumstances. If you determine, when giving affect to the mitigating evidence, if any, that a life sentence is reflected by a negative finding of the issue under consideration, rather than the death sentence, appropriate response to the personal culpability of [1903] the Defendant, then, a negative finding should be given to one of the Special Issues.

Let me try to simplify it. If, when you thought about mental retardation and the child abuse, you think that this guy deserves a life sentence, and not a death sentence, decide life in prison is punishment enough, then, you get to answer one of the those questions no. The Judge has not told you which question, and you have to give that answer, even if you decide the literally correct answer is yes. Not the easiest instruction to follow and the law does funny things sometimes, but, it is what it says, and I have taken all of this time with you to make sure that you understand what he says.

If you think that because of this mitigating evidence the man deserves a life sentence, then, there has got to be a no on that verdict sheet somewhere.

Now, Judge, how much time do I have left?

BY THE COURT:

[1904] About twenty-four minutes.

BY MR. SMITH:

Okay. Let me use some of that, I will use about fifteen of those twenty-four minutes to talk about, maybe a little less, to talk about Issue Number One, deliberateness. Okay. The Special Issue ask, when I find it, "Was the conduct of the Defendant, Johnny Paul Penry that caused the death of the deceased, that caused the death of Pamela Carpenter committed deliberately" and, deliberately is the key word, is the word that we are talking about. What does deliberately mean? The Charge does not tell you. I have no fear that someone told you during voir dire, and I wasn't there, and the notes say that Joe Price gave a definition of deliberately, resulting from unhurried, careful, thorough, and cool calculation; not hasty, rash, or thoughtless. Good enough for Joe Price, good enough for me. If it is not good enough for Mr. Price it is good enough for me. Unhurried, cool, through cool calculation, not hasty, rash or thoughtless.

[1905] What I am saying to you, ladies and gentlemen is that the State has not proved that crime, not proved beyond a reasonable doubt that this crime resulted from unhurried, careful, thorough calculations, that it is completely consistent with the evidence, that there is at least reasonable doubt that this was a hasty crime, a crime comitted in a rage, the rage of a man who was stuck with a pair of scissors and struck back. I am not defending

him, I am not saying it was anything other than a horrible, ugly crime, but, a crime and rage is different from a crime committed deliberately and the crime that doesn't get the death penalty. Forget about Johnny Penry, foreget about child abuse, forget about mental retardation. Wouldn't give me the death penalty, if I did not do it, cooly, deliberately, with advanced calculations. Well, there is Joe Price again What do you mean? How can you say what deliberate? Didn't you read the confession? The confession said that he planned to kill her before he went over to the house. [1906] Yeah, I read the confession, but, that part of it, is not true. How do we know that part of it is not true? Well, for starters, contradicts itself. When I cross examined Ranger Cook, and I cross examined him for the second time, I dwelled on some records in the confession, and I suspect a lot of you, are wondering why I was doing that. Why? The words even the confession, I think, are very important here, and you may wonder why I was doing it. Doesn't make my client, knowing this confession, nothing in this case to make my client look very good. It is a horrible thing. I never said that. All I am saying is life in prison is the proper punishment. "If it had not been the chick I stabbed or killed, it would be Jackie or some other chick, but, I don't think it would have been Jackie, because she wouldn't have fought me."

Well, of course, now, the person that you are seeing there is a weird, mixed up mind that thought Jackie Howdeshell wouldn't have fought. That's not what [1907] I am talking about, because it wouldn't have been Jackie, because she wouldn't have fought me. That means, that he only killed Pamela Carpenter because she did fight him. That is the only meaning that you can give those

words. And, of course, that contradicts what he said in the confession that I knew that I would have to kill her before I went over there. They cannot both be true.

There is something that is not true in that confession, either the line where he said, I knew that I was going to have to kill her when I went over there or the line that says, it wouldn't have been Jackie because she wouldn't have fought me, which says, when you think about it, I killed her only because she fought me. Which one is true? I don't have to go into which one is true, I could drop it here. You got two versions, not beyond a reasonable doubt and no deliberateness. End of excuse. I am not going to do that. The second one is true, when he said, it wouldn't have been Jackie because she [1908] wouldn't have fought me. He was saying, a terrible mixed up thing, like a lot of the things he would say, but, he was speaking from the heart. He wasn't trying to fool anyone, he is not smart enough to plant that little suggestion in the middle of this confession, and Maurice Cook, I asked him, he said, yeah, that part seemed sincere, but, that one, didn't come from a yes or no question, couldn't have come from a yes or no question. There isn't a yes or no question that could get an answer in his own words, "She wouldn't have fought me."

Then, why did he say the other things? That probably was a yes or no question, because you almost can't – can't find out that information unless you ask a yes or no question. You do know before you went over there that you were going to kill her, Johnny? How else would you find out? But, I am not going to leave that. Why does Johnny say yes? Well, Johnny said yes, because retarded people say yes. Maybe Johnny says yes because he [1909]

wants to give the answer that the questioner wants, and there is another reason, really, pathetic, stupid reason. Mentally retarded people don't like to seem retarded. Mentally retarded people like to seem smarter than they are. They don't like to say, they acted in a rash, hasty way, like I lost my head, I didn't know what I was doing, I did a horrible thing, he is not smart enough to know that he can get himself the death penalty by not saying that. People are asking the question, Maurice Cook knew that, and Joe Price knew that, and let me tell you right now, that I am not making any criticism of either one of them, they were both sitting there, Maurice Cook asking the questions when Johnny Penry gave that confession, and I never hoped to see a better prosecutor than Joe Price, and I never hope to see a better police officer than Maurice Cook, and they are both people of total honesty, but, their job, their job at that moment was to build the strongest case they could against Johnny Penry. Nothing wrong with that, it is their job, but, I got [1910] to tell you, ladies and gentlemen, that you can't build a case beyond a reasonable doubt, deliberateness, by getting a mentally retarded person to say I did it, deliberately, especially when he says the opposite in the same confession.

Well, I assume when Joe Price gets up, he is going to say I don't even care about that, because there is enough evidence in the house that it was deliberate, all of the activity in the house shows deliberateness, because there was a time, according to the confession, more than thirty minutes, between the time that Pamela Carpenter stuck him and the time that he stuck her.

First of all, with any guy under these circumstances, that doesn't make it deliberate, that doesn't make it cool, unhurried. It was still rash, hasty, horrible, perfectly horrible, but, the horror of rage is not the horror of cold, deliberate planning; but, in any event, for all of the reasons I have just been talking to you, you cannot take it beyond a reasonable doubt that every detail, every word in that confession [1911] is true. I am no longer arguing that you can say the whole thing is not true, Johnny wasn't there, somebody else did it. Obviously, he was there, he raped her, he murdered her, you found that beyond a reasonable doubt. Not disputing that evidence, but, it is another thing to say, that every word in the detailed, minute by minute account is the way that it happened. I cannot believe that you cannot accept it beyond a reasonable doubt, if only because you don't have a reliable witness. Who is the witness telling you all of these wonderful details? Johnny Penry. Forget about everything else. If you wanted to know beyond a reasonable doubt what happened in a half hour in a room and you want a minute by minute account, first this and this, and this and this and this would you go to him? Would you say if he told you, you believe it beyond a reasonable doubt and, if what you have is not a tape recording of his word, but, a statement resulting from answers to questions given by a very smart police officer, helped by a very able District Attorney, both of [1912] whom are trying to build the best case they could, are you going to say that is beyond a reasonable doubt? Are you going to say that it is impossible or that it proved beyond a reasonable doubt that this didn't happen in the struggle, because I suggest to you, ladies and gentlement, if you

put aside the details of the confession a minute, think about what is likely to have happened. The likeliest thing that would have happened is an exchange of blows in the struggle at the very end when he was on top of her she grabbed the scissors, sticks him in the left shoulder, in the back, about where you can reach to, and he, in a rage, perhaps, takes the scissors from her. It is horrible, never been forgiven more, but, the one word that you didn't use is deliberate, the other word that you didn't use, cool, unhurried, resulting from thought, and word that you can use on it is rash, hasty, and the only answer I submit to you, that you can give to Special Issue Number One, is no, and especially if you bear in mind that the State has not proved it beyond a reasonable [1913] doubt.

Let me tell you one thing that strikes me odd in that confession. I am not saying that it is impossible, I am not saying that it couldn't have happened exactly the way the confession says, of course, it could, and, of course, physical evidence was in a large part, known at the time the confessions were taken. So, if Johnny had said something that couldn't have happened, the most natural thing in the world, would be that Ranger Cook would say that has got to be wrong, Johnny, that couldn't have happened. So, it could have happened, some details maybe couldn't have happened, and in fact, that is the heel mark, if it is a heel mark, could have been made by that, but, if you don't believe, put the heel down on the heel mark, but, most of it could have happened, but, is it likely? The thing that is the strangest to me is the part where he gets up and goes and gets the scissors. I killed her with the scissors because she stuck them in me, and that part rings true, that's what I am saying, that's why he did it; but,

[1914] it comes out in the confession, you are almost thinking poetic justice, I will go get the very weapon she used on me. That doesn't sound like this guy. Much more like this guy, to just see a pair of scissors, to grab them, but, he gets stuck with a pair of scissors, he grabs them, and I got to tell you, if doesn't sound like her, but what does she do while he is going to get the scissors? She lies there and waits for him to get back? It is possible, because there is evidence that she had already been seriously hurt, it is possible, but, she was a fighter, she was a very brave woman, in fact, that is in the confession, that could be true, is the part that is very, very convenient, the prosecutor wants to argue deliberately, but, I say it doesn't ring true, it is not true beyond a reasonable doubt.

BY THE COURT:

Got about fifteen, fourteen minutes.

MR. SMITH:

Okay. I am going to use very little of that fourteen minutes on the second [1915] question. Dangerousness. I am going to talk about it a little. And, the first thing I am going to do is read you a very important part of the Judge's Charge.

"In reaching your decision, you must not consider what effect if any, the laws relating to parole may have upon a life sentence." You must not consider it. It is very important, you have been sworn to an oath not to do it, and I am stressing it to you because, of course, I understand the temptation for somebody to say, well, I know, my brother-in-law knows that is what parole would do,

and this is what we got to consider. The Judge has told you that you must not do it. You have heard no evidence on parole. You will hear no argument on parole, not because either side wants to keep anything back from you, just because it is not before you and only say to you, that it would violate your oath, and it would be wrong, it would be deeply and morally wrong for you to say that we are going to have this man killed because we think, we know, or we guess something is [1916] to going to happen with his parole.

Dangerousness in prison. The State proved three instances on three different occasions. May 23, 1981, they took away a pointed board and a weapon called a shank from Johnny Penry in prison. January 26, 1982, poking at another inmate with a long stick. They took away the stick and they took away another shank. June 22, 1983, poking at another inmate with a broken board, and in that case, the other inmate did threaten to kill him. Knowing that I am going to say is going to make those pretty incidents. They are all within the first four years that Johnny was in jail. He has been in for eleven years, almost eleven. No evidence produced of any instance in the last seven years, any time. No evidence that he hurt anyone in any of those instances, and what I am saying to you is, he has not been a model, but, you can tell that he seems to be getting better, and the prison system can handle him. He is not dangerous in prison, and I don't mean by that, maybe some day, they won't have [1917] to take away another pointed board, but, he is not a rape or murder waiting to happen. It is just not true. He is someone the prison system can handle, has handled, and

has handled without any incident, according to the evidence in the last seven years, and will continue to be handled.

I am quite aware that they put on reputation evidence, they had three, four, five guards saying that he is a bad guy, he is dangerous, he has a bad reputation, and of course, I have no way of meeting that evidence. I can't tell you anything they saw or heard. They just said he was dangerous. All I can tell you, I don't think evidence like that, means very much, and I leave it to you to decide whether it is hard for the State to get that kind of evidence in a case like this, whether it is hard for the Defendant to get contrary evidence in a case like this. I believe the correct answer to Issue Number Two is no.

And, let me take what time I have left to talk about my client, and no one is ever going to forget the bad, frightening, thought [1918] but, I guess, my purpose is to try not to make you forget that, you are not going to forget it, but, try to get you to remember that there is another side, there is a human, even a warm and sympathetic, maybe, a special case. There was a little boy, who was very badly treated by his mother and loved his brothers and sisters and they loved him. He was an affectionate little boy. There was a retarded little boy, who tried so hard on all of those tests, but, it didn't do any good. There was a little boy in a bigger boy's body who went to the Mexia State School for the retarded, and maybe she was young and naive, didn't know a psychopath when she saw it, and I am sure that Mr. Price will tell you that she thought that he was a sweet, warm, little boy with the kind of attention and care that God knows that he never got, he may have turned out a lot different.

The little boy in a young man's body, with a young man's strength and sex drive of a young man, committing crimes that God knows most little boys never commit. Jackie [1919] Howdeshell, I don't know why her testimony got to me. He asked her three times to marry him. Didn't have the heart to say no, two of those times. She said, I will think about it, Johnny. Felt sorry for him. Felt so sorry for him that she couldn't say no, and, of course, Joe is going to remind you that she was almost one of the victims. I guess I don't think that makes that story that pathetic. I think that makes it more pathetic.

You are instructed not to decide this case on sympathy. You are not going to. That instruction is at least in part, for the benefit of the Defense, because, of course, the Defense would be sympathetic to the victim. I guess I am not worried about that, not because I know that you are not going to feel the sympathy. I set in this courtroom, too, I am a lawyer and I am a human being, forty-five years old, old enough that I could have kids, who would be, say perhaps, past the age of the young people that suffer most in this world, and everybody I think my age [1920] what if Diana Koch was my daughter? What if Pamela Carpenter was my daughter? What if Johnny Penry was my son? And, I am not worried abou how much sympathy you are going to feel for the first two, those I would be delighted to have you pour out all of the sympathy that human nature could, because I know human nature, and I think there has got to be some left for that guy.

All I am really saying to you, I guess, is not all, I am saying to you right now, is that this man is a human being, made by God in his image, like all of us. He has –

what mental endowment he has, he is a child, he what he did, he deserves very, very severe punishment. You have the right to punish him. It is wrong to kill him and that is almost the last thing that I am going to say.

BY THE COURT:

Got about three minutes, Counsel.

BY MR. SMITH:

Well, where I come from, it is not customary to seek much about your religious faith. I have never considered myself the [1921] most religious man. I live in a community where if you say, you sometimes don't go to church, I get funny looks. I know, that this community is different. I am going to get over my embarrassment, a little, very very briefly. I have really prayed a number of times silently and I am going to pray now aloud.

May God, Almighty God, make – (unable to hear) Amen.

BY THE COURT:

Is that all of your argument?

BY MR. SMITH:

Yes, Sir.

BY THE COURT:

You want to start now, or recess for a few minutes?

BY MR. PRICE:

Five minutes.

BY THE COURT:

Recess for five minutes. You are not to discuss the case among yourselves or with anyone else. We will start back in five minutes.

REPORTER'S NOTE: (WHEREUPON A FIVE MINUTE

CAUSE NO. 15,977-C

IN THE DISTRICT COURT OF
WALKER COUNTY, TEXAS
278TH DISTRICT COURT

[Caption Omitted In Printing]

[51:1922] RECESS WAS HELD.)

(JURY OUT)

BY MRS. LIEB:

We urge our objection to the photographs?

BY THE COURT:

Objection is overruled.

(JURY IN)

BY THE COURT:

Alright. Mr. Price, at this time you can make your closing argument.

BY MR. PRICE:

Thank you, Your Honor. Please the Court, Defense Counsel, ladies and gentlemen. I am just going to respond to a few things. The most recent thing I guess, that Mr. Smith had to say. He took away most of my arguments, because he anticipated, I guess, and said that I was going to be saying all of these things and took it away from me.

He brought up something that I want to go back to. Heel mark. I know that has already been resolved. I want to point out to you all something about that. [1923] That came up at the very end of the trial, nobody really had a

chance to respond to it, but, during the trial, do you all recall that Dr. Bruce McClendon was called to the stand by the State, testified estensively, you all asked for some of his testimony. In fact, and we came back and we talked about the heel print on her side? Defense never once asked Dr. McClendon a question about the fibulator. Never once asked him a question about the heel print, and then, Corky Cochran testified. They never asked him a question about the heel print and then, Corky Cochran testified. They never asked him anything about the heel print. Nurse Carr testified. These three people were all in the Emergency Room, and, not once, did the Defense ever ask any of them a question about the heel print or the fibulator. Why you would put a fibulator on the side where the kidney is, that explanation, they never asked anything like that and I think that just needs to be put to rest, and I know that you have in your own minds, because you resolved it, but [1924] since it came up again in argument, here, I wanted to put that to rest. They never once questioned any of that, and then, they bring this guy in from Austin that says it is the fibulator. He doesn't know what it looks like in Livingston, he didn't know what the shape of the fibulator is, he didn't know how the kidney was ruptured, and that came up on the tail-end of the trial, and I wanted to go back to that since it was brought up here again, so, you can think about those things.

He talks about a little boy, a little boy's mind. The evidence that you folks heard here the last two weeks, do you think for a moment, that Johnny Penry has got a little boy's mind? He has got a man's body, there is no question about that, we can see that. We can see him sitting

over there, but, is there anybody on this jury that thinks for a moment, that all of the things that you have heard this man has done since he has been grown, that he has got a little boy's mind? How many little boy's do you know, think like that?

[1925] Mr. Smith, or Defense Counsel, rather, argued at the guilt, they argued, – they switched lawyers but at guilt they argued that he didn't do it, and now, they are saying that he did it. He did it, but, he didn't do it, quite like it was in the confession. It was a horrible crime, but he did it in a fit of rage, before they got up here and told you that he didn't do it. Said, that he is not a murder/rapist, waiting to happen. My Lord in Heaven. How many of you believe that? He has got a steady history of crime, and it is going up all the time. Even when he is in the most maximum security prison that the State of Texas has to offer, he is assaultive, he is dangerous, he manages to get his hands on weapons. They bring in here Dr. Price. No relation I will assure you of that, and he talks about him playing with these puzzles and how it takes him fourteen minutes to put these little blocks in the hole. I wonder how long it took him to build those shanks? Adaptive skills. They may have these numbers over [1926] here on this board, but, you have also heard something else, and that is what Dr. Quijano and Dr. Samenow was talking about, and you haven't heard a single expert disagree with them, when they say it takes more than IQ test numbers, and I think you folks are well aware of that now and you probably know a lot more about IQ tests than you did when you were selected on this jury, but, it takes a lot more than that, and that is common sense.

You know, I made that little comment to Dr. Price about taking Tarazan out of the jungle, and that seemed kind of silly. In the jungle he might be the smartest thing there, he has got total control, he is the kind of the jungle, he can adapt, he knows that if you took him out and give him an IQ test, he would come out at the bottom of mental retardation. He would flunk an IQ test. He would make these numbers over here high, because you wouldn't take into consideration the adaptive skills, and that is what you have got to take into consideration. That's common sense. Makes sense [1927] to you. A lot of folks, are not very well educated. A lot of people. We got twenty million, I believe fifteen million people in the United States, adults that can't read and write, and most of those people would do, very, very poorly on an IQ tests. That does not mean for a moment, that they are all mentally retarded. Just common sense and nowhere in this Charge, are you going to see anything that says that you got to leave your common sense behind. I didn't even plan on talking to you about Special Issue Number One, deliberately, because I didn't think for a moment, that anybody would question the fact that Johnny Paul Penry acted deliberately. You have to go no further than his confession and you will have them. That is still evidence. When you start talking about punishment, one of the first things that you have got to consider is what did he do. What is the crime that he is charged with and been found guilty of? You got to look at that. And, this particular issue directs your attention straight back to it, and I am [1928] going to read out of one of the statements, just simply, that part, and these are horrible things, and I don't want to keep bringing them back up, but, this

addresses that issue. He says, "It was while I was fucking her that I decided to kill her with the scissors, since she stabbed me with them. After I got through, I went over and got the scissors by the kitchen door, came back and sat on her stomach. I told her that I was going to kill her and that I hated to, but I thought she would squeal on me. She didn't say anything. I raised the scissors back over my head and stabbed her in the chest, and she said, ouch, or something and then moaned. I got up and zipped up my pants."

If that is not deliberate folks, there ain't a cow in Texas.

Then another little interesting thing he says right after that, I just noticed this, "She raised up and pulled out the scissors. It looked like it was easy for her to pull out the scissors," That stuck in his mind. Why would that stick in his [1929] mind, that it was easy for her to pull them out? Because he had crammed them in her chest with so much force, it shocked him that she could pull them out, so easily, and that didn't kill her, but, there is not anything here, anything that would indicate he did not act deliberately. If that is not deliberate, I don't know how you could get deliberate. That excludes the fact that earlier in the confession, he says, he knew when he went over that he would have to kill her. You know why? Because he just went to the pen, because his other victim, didn't die, and he went to the pen over that one, and he wasn't going to go back to the pen. He went to that house, not only to rape this young woman, but to kill her and he said it in his statement in the beginning, he goes in the door with a pocket knife out. How much deliberation do you have to have? You take my definition all day

long, I will stand by it, and I will stand by this, too, his words.

Dangerous. Commit acts of violence in [1930] the future. There won't ever be a stronger case presented in this Courtroom, I do not believe, because when you start talking about Special Issue Number Two, there is a limited amount of evidence that you can even use on that issue. One, you can look at the crime itself, how bad was it? This crime, speaks for itself. A horrible crime. If somebody could do this one time, does that tell you something about him? If this was the only murder/rape that he had ever committed, does that tell you something about him? A person who could do what he did, to Pamela Carpenter, planned, beat, stomped, raped, murdered, what does that tell you? If he didn't have another ounce of prior violence in him, what does that tell you about a person that could do that one time? Like Bob Smith said, if he walked over there and cut that woman's throat, if you had nothing before you but these confessions, and the evidence in this case about what he did to Pamela Carpenter, would that tell you that, that man was dangerous? Certainly, it would. Just that one crime, but, you got [1931] much, much more than that. He was on parole for rape, hadn't been out of the penitentiary sixty days for aggravated rape when he committed rape/murder. Tell you something else about his mental capacity. He can learn.

Now, Dr. Samenow said, criminals, most of them, make a choice, and all of us have the ability to make that choice. We can either chose with our lives to do good or we can chose to do evil, and he chose evil. He had a choice, and that was his choice. Hadn't been out of the

penitentiary sixty days for rape, but, he learned something. He learned don't leave a witness around. He killed the next one. You won't have somebody there to testify against you, to identify you, somebody like Diana Koch that came into this Courtroom, while we are talking about her case, and I forget, I want to brag on her. How much guts do you think it took for her to come in here and bear her sole? I asked her to come down and testify about some of the most horrible things that ever happened [1932] to her, in her life, more horrible than most of us will ever have happen to us. She came down here, a little short thing, crawled up on there on that witness stand, she pointed him out, and you could see the pain, you could see the hurt in her, but, she did it. And, why? Why would she put herself through that? Do you think that she thinks that this man is dangerous? Why would she do that? Because she thought it was important that you people know, you people know, Johnny Penry. You know, you need to know not only what he did to Pamela, but, you need to know what he has done to others, and you needed to know that. He has got an entire history, his whole life of crime and violent acts, and they continually do one thing, they get worse, worse, and worse and worse, and they go from picking on kids and trying to stick them with pencils and scissors, even cruelty to animals, to arson, to setting fire to patients, to people. We are not talking about setting fire to a building, we are talking about setting fire to another person. To rape, to capital [1933] murder. We have gone the route. And, here we are. When somebody stands up here and says, this guy is not dangerous. You have heard so many witnesses come in here and say he is dangerous. You have heard

people that have known him for the last ten years. Well, that's been around him and everyone of them says that he is assaultive, he is dangerous and not once did the Defense lawyer ever ask them why you think so. Why do you think Johnny Penry is dangerous? Nobody ever asked that question, because they didn't want to hear the answer. You have got every form of evidence that can be presented in a capital case, you got expert testimony from two psychologists and a psychiatrist back in the Guilt Phase, that is a dangerous man, and I don't think there is any question in any of you all's mind, that he is dangerous. There couldn't possibly be, under all of this evidence.

You have got his prior record, his history of violence, and then, ultimately, you have got this murder, which is a horrible, [1934] horrible crime. It has been a long time, since October 23, 1979. Long time.

Talk about love and hate, being mixed up. That is socio-pathic, psycho-path, no remorse. Have you seen any evidence, any indication of any kind of remorse? He is not capable of it, He is not capable of it, and that is what makes him extra dangerous. We all, or most of us have inside of us, called a conscience, and something that holds us back and keeps us from doing bad acts, and then, when we do we feel bad about it. It kind of keeps us in check. We don't do that again, or wouldn't do anything like that, and certainly, wouldn't do anything worse. That keeps us under control. That is why the doctors told us about the anti-social personality or psycho-patch or whatever, called several different terms, but, it all has one thing in common, and that is no remorse, no conscience,

dangerous, dangerous, and you folks have got a duty and responsibility here on this jury.

This part of the trial is society's [1935] part of the trial. A Defendant has got plenty of rights and they ought to be enforced and they have been. He has an attorney representing him throughout this trial, and that is well and good. He has had the Judge here to make sure that all of his rights and everything was protected. Nothing wrong with that. But, now we are down to society's part of the trial. And, society, has a direct say in this, and when I say society, I am not talking about some fancy group of folks somewhere or another, or some government, I am talking about the people in Walker County, in Polk County, people out there on the streets, like Diana Rearden, like Pam Carpenter. This is society's part of the trial and you got a duty an obligation to society, just as much as you have the responsibility to see that this man receive a fair trial, which you have done, and are doing and I have no question about that, but you also, have a responsibility, an obligation to see that society is protected and society receives a fair trial.

[1936] Talk just a little bit about Shirley Penry. I didn't even intend to bring her up either. I know this man had a bad childhood, there is no question about that, and I am not going to try to white-wash it for one moment, any of that, but I can tell you a few things that might give you something to think about. She's dead, for one thing, and they know it, and they know that she can't come in here and tell her side of this. Another thing that you know from the evidence, is that before, while she was alive, she testified for this man. Now, that she is dead, she is being put on trial. Who was it that took him to the

University of Texas Medical Branch in Galveston? She did. Who was it that got him in the Mexia State School? She did. Bob Smith just read the application there to you a minute ago, and talked about her spelling wasn't too good, or whatever. She may have been a lot of things, but, I don't think for a moment she was what they made her out to be, but, irregardless of that, what you are here to do, is to determine [1937] the appropriate punishment in this case. She is not on trial here. She might should have been at some point in time, and I am like Dr. Quijano and Dr. Samenow, whichever one it was that said, if she did all of those things, that is criminal, no question about that, absolutely, first, lets remember that there are two sides to every story, and we haven't heard her side. You haven't heard it, you have not heard it. You heard a story that first of all said, that Mr. John Garner Penry, the father, didn't ever know anything about this.

Do you recall, we are talking about a period of twelve years, because he was twelve years old when he went into Mexia State School. Twelve years of abuse of the most horrible kind that anybody could possibly ever heard of and imagine, and Mr. Penry, supposedly never knew about it. I don't know how he avoided the stinking bedroom. I don't know how he avoided the claw marks, the cigarette burns, the beatings all of that horrible abuse that they talked about. Just like I don't understand, how [1938] those scars went away. I don't understand that either. Just remind you, that there is a little more to it than what has been presented here. Kind of like presenting some of these records, give a little piece of the record, but, don't give it all to you. You get a little bit of it, a one-sided view of it. How did this kind of abuse go on for ten

or twelve years and never, never once get reported? You got a neighbor that heard screams for weeks. Is that believable? You know we talked about credibility of witnesses, and that is your job to decide about the credibility of these witnesses, and one way of doing that, does it make sense, and the other way, is how does it stack up against all of the other testimony. Does that make sense to you in that a mother of seven children would sit and listen to a child screaming everyday, all afternoon long, weeks and weeks, she said to start with, finally got down to two or three when she realized what was happening. Does that make sense? Those witnesses, you can't put them together and [1939] come out with a consistent story. There's no way you can put those witnesses together. The sister said, he was a normal child at four years of age, somewhere around five, he became retarded. She saw nothing wrong with him at four years of age. Some others have him being horribly abused when he was one, two, and three years old. You can't put those stories together, and if he did get brain damage by getting hit by a shoe, like Mr. Smith so vividly described to you, then how come all of those medical tests do show one ounce of it? Not one bit of brain damage, and if he was burned all the way up on his back and his buttocks, there is photographs of all of that in here, how come those scars went away? If he was burned with cigarettes all over, how come those scars went away? If he was every beatened with belt buckles and all of those kinds of things, and extension cords, where are those scars? The only scars on him are the marks that Pamela Carpenter put on him, that led to his advocation, ultimately, and the

burns on [1940] his legs, which nobody has ever disputed, his own mother reported it, when she carried him to the University of Texas Medical Branch, she reported him having his legs burned when he was a child, and she reported to the broke arm, that had happened when he was like two years old or something. You don't have to be an expert in child abuse, to question some of this. Common sense will tell you a few things, but, whatever Shirley Penry is, was, or whatever, she is not on trial here. Although, the Defense would love for you to concentrate on her and forget about Pam Carpenter, forget about Diane Rearden, forget about what this Defendant has done and is likely to do again, they don't want you thinking about that. They want you thinking about a dead woman that has been dead for ten years, that cannot come in here and testify herself.

And, where is Mr. John Penry? Where is John Garner Penry? Working over at Wal-Mart in Livingston. The best witness there could be. He wasn't two years old when it happened, he can remember. He was [1941] there everyday for twelve years, that this abuse supposedly went on. Where is he?

Think about that.

BY THE COURT:

You got ten minutes, Mr. Price.

BY MR. PRICE:

We talked about child abuse. Three things they brought in here to you. Brain damage. Dispense with that pretty quickly. Absolutely no evidence of brain damage, other than J. Randall Price, that he ordered some tests

that was suppose to tell you what part of the brain was damaged. Didn't do it. Just told him that the whole brain was damaged.

We brought you all of those tests that have been performed, state of the art examination of this man's head, within the past thirty days prior to trial, and it shows absolutely no brain damage.

Then, what do we got? We got mental retardation, and how is that a mitigating factor? How does that reduce his blame? I haven't heard these lawyers, or this lawyer talk to much about that. He slid [1942] around that personally culpability, but that is what that instruction says, and it says it three times on that one page, is that if you are going to consider mitigating circumstances, in order to be one, it has got to be something that reduces his blame in this case, and in this case, he is charged with the murder and rape of Pam Carpenter, and so, you ask yourself, do these things that this lawyer has talked to you about mitigation, do they reduce his blame? You got absolutely no evidence of that. Their own expert they brought in here said, that there is no causal connection. There may be an indirect cause, he says, because of the frustration level or something of that nature. Do you think that the type of crime that you are talking about here has something to do with somebody getting frustrated? Do you think the type of criminal acts that this man has committed has something to do with somebody being frustrated or having a low frustration tolerance? Bull. He functions quite well. Everybody that knows [1943] him, outside of his family, and I got no fault with those folks, I expected that, but everybody that knew him outside of his family, Harold Stubblefield, a dead man,

testified that he worked for him two or three weeks, and he carried him over to the Carpenter residence, said he ran him eight hours that day. Do you remember his testimony was read to you? Didn't notice anything unusual about him. Adaptive skills. He can get along. And, Dr. Quijano, told you what the law is, and what all of these manuals that all of these doctors cite say about mental retardation, but, even for a moment, let's say that he is mildly retarded. Just assume that for a moment. Nobody and there has been no evidence that says that causes a person to commit rape and murder. In fact, just the opposite. The mentally retarded are less likely to commit violent acts than those that are not mentally retarded, so, it can't be a cause and it can't be a mitigating factor, and that leaves us with this child abuse, which is suspect in some [1944] areas and some areas I am sure that was very much so, some abuse, but, likewise, the man that has more experience than anybody in this Courtroom, you know, who he is, he got questioned about that. Mr. Smith knew what he was doing, it just came out a little different. Mr. Smith didn't realize that Dr. Quijano had been the victim of an extreme, extreme child abuse, and he thought that maybe he had had an alcoholic father and just roughed up a little bit, here or there, and so, when he asked him that question, he knew that Dr. Quijano was an honest man, and was going to give him an honest answer, and felt like well, you compare your case to Johnny Penry's how would that compare? His eyes got glassy, he thought about it. Very close, very close question.

BY THE COURT:

Got about five minutes, Mr. Price.

BY MR. PRICE:

That man told you that there is no causal connection between child abuse and rape/murder. If there was any connection [1945] in that area, Diana Rearden could go out here and commit anything that she wanted to now, you know, I have been raped, so I can go do what I want to do. Nobody, no evidence, none of all that there is a causal connection.

I mentioned to you, this is society's part of the trial. I am going to get down to the heart, and then, sit down and shut up.

This has been a long, long ordeal for a lot of people. Long ordeal. I told you in opening argument this began on October 25th, to bring this man to justice. Pamela Carpenter started this battle to bring it to justice when she gave that description and when she put those two puncture holes in his back. She started that battle to bring him before the bar of justice. It is here now, and it is fixing to be handed to you and you do carry a very, very high responsibility and a very serious obligation. You have an obligation to protect society from the likes of Johnny Paul Penry, and you [1946] have an obligation to be sure that the punishment fits the crime, and you know how horrible the crime is and if there is anybody in this room that believes in the death penalty, we know that it is Johnny Paul Penry, because he inflicted it, without giving Pam Carpenter the right to a judge, jury, a lawyer. She didn't get her rights read to her, she got a pair of orange handled scissors buried deep in her chest.

The best example that I can give you of responsibility, and I am going to set down, your responsibilities

in this case, is the facts of the case, and one thing that just kind of is back in the background there, and I want to point this out to you because it comes right back to your responsibility, and your decision in this case. In 1977, this man raped Diana Rearden. A few months later he was examined by Dr. Felix Pebbles, who found that he was sane. He knew the difference between right and wrong, and he was competent to stand trial, but, Dr. Pebbles, went on [1947] and made an additional finding that was really out of the ordinary, and I have never seen this in any kind of a report, he just added it, he said that it is my further professional opinion, that if Johnny Paul Penry were released from custody, that he would be dangerous to other persons. That was written on May 19, 1977. Two years later, and in August of 1979, Johnny Paul Penry was released from custody on parole, less than sixty days later, he murdered and raped Pam Carpenter. You have a responsibility to see that, that never occurs again. The horror that is Johnny Paul Penry is, etched in face, in the sole of Diana Rearden and it is etched in the blood of Pam Carpenter. It must end here and that is your duty and responsibility. Thank you very much.

BY THE COURT:

Ladies and gentlemen of the jury, again, you are reminded that you are not to consider the argument of either of the attorneys as any evidence. At this time, you will retire into the jury room and

* * *

Cause No. 15,977-C

THE STATE OF TEXAS	:	IN THE DISTRICT
vs.	:	COURT OF WALKER
JOHNNY PAUL PENRY	:	COUNTY, TEXAS 278TH
	:	JUDICIAL DISTRICT

REQUESTED INSTRUCTION NO. 30

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant in the above styled and numbered cause, and after the State and the Defendant have rested their respective cases during the hearing on punishment, and prior to the arguments of counsel and prior to the reading of the Charge to the jury, the Defendant hereby requests the Court to instruct the jury as follows:

> Deliberately means a manner of doing an act characterized by or resulting from careful and thorough consideration; characterized by awareness of the consequences; willful, slow, unhurried, planned and premeditated and steady as though allowing time for decision. The term "deliberately" therefore has a meaning different and distinct from the term "intentionally." You have already found that the murder was committed intentionally because intent was an element of the crime of capital murder. You must now decide whether the defendant's conduct causing death was deliberate, as well as intentional. If you have a reasonable doubt about whether his conduct was deliberate or merely intentional, you must answer Special Issue No. 1

"no," even if you are certain that he intentionally caused the victim's death.

WHEREFORE, PREMISES CONSIDERED, the Defendant respectfully prays that this Honorable Court will submit the foregoing Defendant's Requested Instruction to the jury during this the hearing on punishment.

Respectfully submitted,

MALONE and WRIGHT
Attorneys at Law
P.O. Box 6547
Huntsville, Texas 77342-6547
(409) 291-2211

By: /s/ John E. Wright
John E. Wright
State Bar Card No. 22048500

ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document has been hand delivered to Mr. Joe Price, District Attorney, in open court, on this the 16th day of July, 1990.

/s/ John E. Wright
John E. Wright

Cause No. 15,977-C

THE STATE OF TEXAS	:	IN THE DISTRICT
vs.	:	COURT OF WALKER
JOHNNY PAUL PENRY	:	COUNTY, TEXAS 278TH
	:	JUDICIAL DISTRICT

ORDER

On this day came on to be heard the foregoing Requested Instruction, and the same having been timely and properly presented to the Court, prior to the reading of the charge to the jury at the punishment phase of the trial, the same is hereby denied, to which the Defendant duly excepts.

SIGNED AND ENTERED this 16 day of July, 1990.

/s/ Joe Ned Dean
JUDGE PRESIDING

CAUSE NO. 15,977-C

THE STATE OF TEXAS	§	IN THE DISTRICT
	§	COURT OF WALKER
V.	§	COUNTY, TEXAS 278TH
JOHNNY PAUL PENRY	§	JUDICIAL DISTRICT

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

By your verdict returned in this case you have found the defendant guilty of the offense charged in the indictment, that is, capital murder, which was alleged to have been committed on or about the 25th day of October, 1979 in Polk County, Texas. It is necessary, now, for you to determine, from all the evidence in the case, the answers to certain questions, called "Special Issues," in this charge. The court instructs you further, however, as follows:

1.

The mandatory punishment for capital murder is death or confinement in the penitentiary for life.

2.

The burden of proof in this phase of the trial still rests upon the State and never shifts to the defendant. Each Special Issue submitted must be proved by the State beyond a reasonable doubt; therefore, before any issue may be answered "Yes," all jurors must be convinced by the evidence beyond a reasonable doubt that the answer to such issue should be "Yes." If the jury unanimously

determines (and only if such determination is unanimous) that the State has proved an issue beyond a reasonable doubt, then the Foreperson will so record the jury's answer to such issue by signing his or her name to the finding reflecting such answer on the form provided for that purpose.

You are further instructed that if any juror, after considering the evidence and these instructions, has a reasonable doubt as to whether the answer to a Special Issue should be answered "Yes," then such juror should vote "No" to that Special Issue in the jury's deliberations.

If ten (10) jurors or more vote "No" as to any Special Issue, then the answer of the jury shall be "No" to that issue, and the Foreperson will so record the jury's answer by signing his or her name to the finding reflecting such answer on the form provided for that purpose.

If there is any Special Issue on which the vote of the jurors is not unanimously "Yes" or not at least ten (10) in favor of an answer of "No," then there shall be no answer for that Special Issue and the Foreperson should not sign his or her name to any answer form for that Special Issue.

3.

You are further instructed that in determining each of these Special Issues you may take into consideration all of the evidence submitted to you in the full trial of the case, that is, all of the evidence submitted to you in the first part of this case wherein you were called upon to determine the guilt or innocence of the defendant, and all of the evidence, if any, admitted before you in the second

part of the trial wherein you are called upon to determine the answers to Special Issues hereby submitted to you.

You are instructed that the defendant may testify in his own behalf if he elects to do so, but if he chooses not to do so, that fact cannot be taken as a circumstance against him nor prejudice him in any way. The defendant has elected not to testify in this punishment phase of trial, and you are instructed that you cannot and must not refer to nor allude to that fact throughout your deliberations or take it into consideration for any purpose whatsoever as a circumstance against the defendant.

In reaching your decision, you must not consider what effect, if any, the laws on parole will have upon a life sentence.

No one has any authority to communicate with you except the officer who has you in charge. During your deliberations in this case, you must not consider, discuss, nor relate any matters not in evidence before you. You should not consider nor mention any personal knowledge or information you may have about any fact or person connected with this case which is not shown by the evidence.

4.

You are instructed that if you return an affirmative finding on each of the special issues submitted to you, the court shall sentence the defendant to death. You are further instructed that if you return a negative finding on

any special issue submitted to you, the court shall sentence the defendant to the Texas Department of Corrections for life. You are therefore instructed that your answers to the special issues, which determine the punishment to be assessed the defendant by the court, should be reflective of your finding as to the personal culpability of the defendant, JOHNNY PAUL PENRY, in this case.

You are instructed that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

You are further instructed that you are not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling in considering all the evidence before you and in answering the special issues.

The Special Issues, with forms for your answers, are as follows:

SPECIAL ISSUE NO. 1

Was the conduct of the defendant, JOHNNY PAUL PENRY, that caused the death of the deceased, PAMELA CARPENTER, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

ANSWER

We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes."

/s/ Douglas R. Massey
FOREPERSON

OR

We, the jury, because at least ten (10) jurors have a reasonable doubt as to the matter inquired about in this Special Issue, find and determine that the answer to this Special Issue is "No."

_____
FOREPERSON

SPECIAL ISSUE NO. 2

Is there a probability that the defendant, JOHNNY PAUL PENRY, would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER

We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes."

/s/ Douglas R. Massey
FOREPERSON

OR

We, the jury, because at least ten (10) jurors have a reasonable doubt as to the matter inquired about in this Special Issue, find and determine that the answer to this Special Issue is "No."

_____
FOREPERSON

SPECIAL ISSUE NO. 3

Was the conduct of the defendant, JOHNNY PAUL PENRY, in killing PAMELA CARPENTER, the deceased, unreasonable in response to the provocation, if any, by the deceased?

ANSWER

We, the jury, unanimously find and determine beyond a reasonable doubt that the answer to this Special Issue is "Yes."

/s/ Douglas R. Massey
FOREPERSON

OR

We, the jury, because at least ten (10) jurors have a reasonable doubt as to the matter inquired about in this Special Issue, find and determine that the answer to this Special Issue is "No."

FOREPERSON

FILED: 7/16/90 5:00 P.M.

/s/ Joe Ned Dean
JOE NED DEAN,
PRESIDING JUDGE

VERDICT

We, the jury, return in open court the above answers as our answers to the Special Issues submitted to us, and the same is our verdict in this case.

/s/ Douglas R. Massey
FOREPERSON

TEXAS COURT OF CRIMINAL APPEALS

JOHNNY PAUL PENRY,
Appellant

v.

THE STATE OF TEXAS,
Appellee

Appeal from Polk County
No. 71,130

OPINION

In July 1990, a Walker County[1] jury found appellant, Johnny Paul Penry, guilty of the capital offense of murder in the course of committing aggravated sexual assault.[2] *See* Tex. Penal Code § 19.03(a)(2). The jury answered the special punishment issues affirmatively, and the trial court assessed punishment at death. *See* Tex. Code Crim. Proc. art. 37.071(b).[3] Appeal to this Court is automatic. *See* Article 37.071(h). On appeal, appellant raises 135 points of error, but he does not challenge the sufficiency of the evidence to support the jury's finding of guilt.[4] We will affirm.

COMPETENCY TRIAL

Appellant maintains in points of error 121-123 that the trial court abused its discretion when it denied his

[1] Appellant's trial was held in Walker County on a change of venue from Polk County.

[2] Appellant was found guilty of the same offense in a previous trial, but that conviction was reversed by the United States Supreme Court. *See Penry v. Lynaugh*, 492 U.S. 302 (1989).

[3] Unless otherwise indicated, all references to articles are to those in the Texas Code of Criminal Procedure.

[4] The facts of the instant case may be found in the discussion of point of error 114a, *infra*.

motion for change of venue raised at the competency trial.[5] The motion and accompanying affidavits alleged that appellant could not get a fair trial in Walker County due to pretrial publicity. He argues that the trial court's failure to change venue violated his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

At the venue hearing, appellant presented evidence of various articles appearing in four Texas newspapers, *The Houston Chronicle*, *The Houston Post*, *The Dallas Morning News*, and *The Huntsville Item*. The majority of the articles appeared in January and February 1989, when appellant's original case[6] was before the Supreme Court, and again in June and July 1989, when the Supreme Court issued its opinion reversing his original conviction. This was more than six months prior to the May 1990 competency trial. Only three articles were printed in February and March of 1990. Two of those articles dealt with the original change of venue from Polk to Walker County; the third article was a letter to the editor.

Hal Ridley, a criminal-defense lawyer practicing in Walker County, testified for appellant. He suggested that the public was already familiar with the case and was familiar with the fact that appellant had already received a death sentence which had been overturned. Ridley did admit, however, that many of the newspaper articles were favorable to appellant. He further stated that

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[5] Venue had already been changed from Polk County to Walker County.

[6] *See* footnote two.

because so many potential jurors were connected with the Texas Department of Criminal Justice (T.D.C.J.),[7] the potential jurors could not help being prejudiced against appellant. The State presented only its controverting affidavit to rebut appellant's assertions.

The trial court took judicial notice of the voir dire examination of the competency venire. During voir dire, it was determined that twenty-one veniremembers had heard something about the case, most having read about it in their local newspaper. Only two veniremembers stated that the information they had obtained would bias their opinions, and they were excused for cause.[8] Of the remaining panelists who were questioned about their knowledge, three were aware that appellant was a death-row inmate but did not know any details of his offense; three others knew only that he had killed someone; one knew there had been a change of venue; another knew appellant's name and was aware that he had done something "against the law;" and one *thought* he may have seen appellant as an inmate in the prison in Huntsville.

Article 31.03(a) provides that a change of venue may be granted on a defendant's motion if "there exists in the county where the prosecution is commenced so great a prejudice against him that he cannot obtain a fair and impartial trial." However, merely because a case has been well publicized in the media does not automatically

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[7] Formerly the Texas Department of Corrections.

[8] Venireperson Carpenter knew the victim, and venireperson Farris could not "spiritually set aside" her opinion. Venirepersons Mason and Bruner had also read about the case but were excused for other reasons.

establish prejudice so as to require a change of venue; due process does not require that jurors be completely ignorant of the facts of the case. *Narvaiz v. State*, 840 S.W.2d 415, 428 (Tex.Crim.App. 1992); *Ransom v. State*, 789 S.W.2d 572, 579 (Tex.Crim.App. 1989). Due process requires only that a juror lay aside his impression or opinion and render a verdict based on the evidence presented in court. *Morris v. State*, 488 S.W.2d 768, 771-72 (Tex.Crim.App. 1973).

A defendant seeking a change of venue on grounds of pretrial publicity must show the existence of such prejudice in the community that the likelihood of obtaining a fair trial is doubtful. *Narvaiz*, 840 S.W.2d at 428. An appellate court will not reverse a trial court's decision to deny a change of venue absent an abuse of discretion. *Id.*; *Hathorn v. State*, 848 S.W.2d 101, 109 (Tex.Crim.App. 1992).

Appellant has shown us nothing in the record that demonstrates that the trial court's denial of his motion to change venue was outside the realm of reasonableness. *See Narvaiz*, 840 S.W.2d at 428. No member of the competency venire not struck for cause had formed an opinion as to appellant's competency or guilt. Points of error 121-123 are overruled.

Points of error 124 and 125 aver that the trial court erred in refusing to conduct individual voir dire and in refusing to sequester the jurors at the competency phase even though "a large number of the panel members had been exposed to extensive publicity." However, because appellant has provided no argument or authority regarding these issues, we consider the points inadequately

briefed and as presenting nothing for our review. Tex. R. App. Proc. 74(f); *Robinson v. State*, 851 S.W.2d 216 n.4 (Tex.Crim.App. 1991). Points of error 124 and 125 are overruled.

In points of error 126-131, appellant alleges that the trial court made numerous reversible errors during jury selection at the competency trial. Specifically, he contends the trial court erred in overruling his challenges for cause because the veniremembers had biases or prejudices against him. *See* Article 35.16(a)(9).

The denial or grant of a challenge for cause is within the discretion of the trial court and will not be overturned absent an abuse of that discretion. *Mooney v. State*, 817 S.W.2d 693, 701 (Tex.Crim.App. 1991). We examine the record as a whole to determine whether there is support for the trial court's decisions, and, in doing so, we give great deference to the trial court. *Satterwhite v. State*, 858 S.W.2d 412, 415 (Tex.Crim.App. 1993). The trial court is able to consider such factors as demeanor and tone of voice that do not come through when reviewing a cold record. *Mooney*, 817 S.W.2d at 701. Appellant was granted no additional peremptory strikes.

In point of error 126, appellant complains that prospective juror Taylor was biased because he knew appellant was a death-row inmate and felt psychologists were trying to run a "con game" to help appellant avoid the consequences of his actions.

There is no requirement in our law that jurors be completely ignorant of the facts of a case. *Cockrum v. State*, 758 S.W.2d 577, 589 (Tex.Crim.App. 1988); *Nethery*, 692 S.W.2d at 694. The sole question is whether a juror

can put aside prior knowledge and opinion and render an impartial verdict. *Cockrum*, 758 S.W.2d at 589; *see also Murphy v. Florida*, 421 U.S. 794, 799-800 (1975). During voir dire, Taylor stated that he knew appellant was an inmate on death row, but also that he knew no facts about the crime. Moreover, Taylor assured the trial court and the attorneys that he had formed no opinion as to appellant's competency and was not affected by his knowledge of appellant's death-row status.

Next, Taylor initially stated that he believed psychiatrists were trying to run a "con game" by testifying that defendants are incompetent. He believed that the "business of competency" was a way for a defendant to avoid being prosecuted. However, Taylor also stated that he would be able to put that opinion behind him and render a competency verdict strictly on the evidence, including psychiatric evidence, presented.

There is a distinction between prejudice on the part of a juror and the mere entertaining of an opinion. *Kemp v. State*, 846 S.W.2d 289, 299 (Tex.Crim.App. 1992). Simply because Taylor stated he felt some defendants might attempt to feign incompetence did not mean he had formed a conclusion as to *appellant's* competency. Taylor was not disqualified as a matter of law from serving as a juror in this case. We see no abuse of discretion on the part of the trial court. Point of error 126 is overruled.

In point of error 127, appellant asserts that prospective juror Watkins should have been disqualified as a juror because he knew appellant was a death-row inmate through a bulletin he received at work. Appellant argues in points of error 128 through 131 that, due to media

coverage, prospective jurors Moore, Massey, Weinzierk, and Ritchey each knew that appellant had killed someone and, therefore, they should also be disqualified. Massey also knew that appellant was on death row and that venue had been changed from Polk County.

All these jurors stated unequivocally that they had formed no opinions regarding appellant's competency. They all stated that they could set aside their knowledge and render a verdict based strictly on the evidence. As we have previously stated, the mere fact that a prospective juror has received some information about the accused's case through the news media does not automatically disqualify him from serving as a juror. *Cockrum*, 758 S.W.2d at 589. Because each of these jurors assured the trial court that he or she could put aside prior knowledge and render an impartial verdict, the trial court did not abuse its discretion. *Id.* Points of error 127 through 131 are overruled.

In points of error 117-119, appellant complains that the burden of proof at the competency hearing should have been placed on the State. Appellant argues that placing the burden to prove incompetency on him violated § 2.05 of the Texas Penal Code, the Eighth Amendment to the U.S. Constitution, and the due process guarantees of both the U.S. and Texas Constitutions.

At trial, appellant objected to the burden of proof only on the basis of due process. Because his trial objection does not comport with the Penal Code and Eighth Amendment issues raised on appeal, he has not preserved them for our review. Tex. R. App. Proc. 52(a); *Barnes v. State*, 876 S.W.2d 316, 325 (Tex.Crim.App. 1994);

Johnson v. State, 803 S.W.2d 272, 293 (Tex.Crim.App. 1990). Therefore, we shall address appellant's argument only as it relates to due process.

A defendant is presumed competent and shall be found competent to stand trial unless proved incompetent by a preponderance of the evidence. *See* Article 46.02, § 1(b). The burden of proof in a competency hearing is on the defendant. *Barber v. State*, 757 S.W.2d 359, 363 (Tex.Crim.App. 1988).

In *Medina v. California*, 112 S.Ct. 2572, 2579-80 (1992), the Supreme Court stated:

> Once a State provides a defendant access to procedures for making a competency evaluation . . . we perceive no basis for holding that due process further requires the State to assume the burden of vindicating the defendant's constitutional right by persuading the trier of fact that the defendant is competent to stand trial.
>
> * * *
>
> The Due Process Clause does not . . . require a State to adopt one procedure over another on the basis that it may produce results more favorable to the accused. Consistent with our precedents, it is enough that the State affords the criminal defendant on whose behalf a plea of incompetence is asserted a reasonable opportunity to demonstrate that he is not competent to stand trial.

(Citations omitted.) *Medina* is plainly applicable to the instant case.

We hold that Article 46.02 provides adequate procedures to protect a defendant's right to due process at a

competency trial. The trial court did not err in denying appellant's requested instructions to place the burden of proof on the State. Points of error 117-119 are overruled.

In point of error 120, appellant complains that the trial court erroneously refused to submit his requested instruction No. 5, which would have informed the jury of the effect of a finding of incompetence. He argues that the absence of the requested instruction rendered the finding of competence unreliable, thus violating his Fourteenth Amendment right to due process and his Eighth Amendment right to be free from cruel and unusual punishment. The trial court charged the jury according to the requirements in Article 46.02. Appellant cites us to no other authority for his argument.

Appellant did not raise any constitutional objections regarding the submission of his requested instruction. Because his trial objection does not comport with the issues raised on appeal, he has preserved nothing for our review. *Barnes*, 876 S.W.2d at 325; *Johnson*, 803 S.W.2d at 293. Point of error 120 is overruled.

In points of error 115 and 116, appellant contends the trial court erred in failing to instruct the jury on the meaning of the statutory phrase, "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." Specifically, he complains that the trial court refused his request to define the terms "rational," "reasonable," and "understanding," which, he claims, are vague and indefinite.

The test to determine competency is "whether [the defendant] has sufficient present ability to consult with

his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him." *Dusky v. U.S.*, 362 U.S. 402, 402 (1960). Texas has codified this standard in Article 46.02, § 1(a). Neither the Supreme Court nor our statute requires any definition of the terms found therein.

We do not believe that the terms "rational," "reasonable," and "understanding" have become so technical that they are legal terms of art requiring the trial court to define them. "Where terms used are words simple in themselves and are used in their ordinary meaning, jurors are supposed to know such common meaning and terms, and under such circumstances such common words are not necessarily to be defined in the charge to the jury." *Russell v. State*, 665 S.W.2d 771, 780 (Tex.Crim.App. 1983) (citations omitted). The jury was entitled to give the terms their ordinary meanings. The trial court did not err in failing to instruct the jury on the definition of these terms. Points of error 115 and 116 are overruled.[9]

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[9] Appellant also argues that the vagueness of the terms caused him harm because of the facts of his case. We disagree. Appellant failed to demonstrate how his case differed from any of the myriad of competency trials that take place each year. Further, he cites us to *Penry v. Lynaugh* as authority governing competency trials. After a careful review of the case, we conclude that it is not controlling authority in the case of a competency hearing.

CHANGE OF VENUE

In his 35th point of error, appellant complains of the trial court's overruling of his motion for a change of venue of the trial on the merits. As in his previous hearing at the competency trial, appellant alleged that so great a prejudice existed against him in Walker County that he could not obtain a fair trial. Specifically, he complained of extensive prejudicial publicity, the proximity of the community to the situs of the crime, and the fact a number of Walker county residents were employed by the T.D.C.J. He asserts that the alleged error violated his rights under the Sixth, Eighth, and Fourteenth Amendments.

The authorities and standard of review for a denial of a motion to change venue for the trial on the merits are identical to those set out in points of error 121 through 123, *supra*. Therefore, we need not repeat them.

The hearing on the motion took place on May 22, 1990. The evidence presented showed that the population of Walker County was 55,206. The T.D.C.J. employed 5,168, although not all employees were residents of Walker County. The *Huntsville Item*, *Houston Post*, and *Houston Chronicle* were shown to have reasonably large circulations in the county. Approximately seventy articles from those papers were admitted in evidence. The articles covered a time range of approximately 660 days. About fourteen of the articles appeared in the six months preceding trial, and they dealt mainly with the original change of venue from Polk County and competency matters. Also admitted in evidence was the partial script of a news broadcast out of Bryan and two videotapes of news

broadcasts out of Houston, dated October 19, 1988, and January 1, 1989. A review of the record reveals that the majority of news reports centered around the time appellant's case was before the Supreme Court.

Appellant called five witnesses to testify. Professor Raymond Teske presented an opinion poll comparing the percentage of people aware of the case and willing to assess the death penalty in Walker County versus Galveston County.[10] Attorneys William Habern, Kay Douglas, and Jane Swanson testified that they did not believe appellant could receive a fair trial due to the bias in the community. Finally, Professor Edward Bronson testified

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[10] The opinion poll was designed to determine the percentage of people aware of the instant case. Initially, respondents were asked whether they were aware of a case involving appellant. Thirty-nine out of 100 respondents in Walker County answered "yes." If the respondent answered "no," the pollsters then gave specific facts of the case including:

> (1) [Appellant] has been accused of the murder of Pamela Mosley Carpenter, a housewife who was raped and stabbed with a pair of scissors in Livingston in 1979.
>
> (2) Also, [appellant] was convicted and given the death penalty in 1980 for the death of [Carpenter]. Later, the Supreme Court reversed the conviction.
>
> (3) Mark Mosley, one of her older brothers, was a former professional football player.
>
> (4) Finally, [appellant] is considered mentally retarded.

The respondents were then asked whether they were aware of the case. Teske admitted that the information given to the respondents could likely influence their response.

regarding the potential prejudicial effect created by the news media.[11]

In rebuttal, the State called six witnesses who expressed the opinion that appellant could obtain a fair trial in Walker County. The witnesses included Oscar Thorn, the Walker County Tax Assessor-Collector; Dale Meyers, Walker County Sheriff; Randy Ellisor, the manager of Huntsville Cable T.V.; Randall Davis, a local insurance agent; Travis McDonald, an assistant prosecutor for the Prison Prosecution Unit in Huntsville; and Judge Frank Robinson. Each testified that he had heard very little, if any, talk about the case and had seen little newspaper coverage. McDonald also testified that he did not believe that employment by T.D.C.J. would affect a juror's ability to fairly decide a criminal case.

The trial court further took judicial notice of the voir dire that occurred at the competency trial and the general voir dire held the day before the instant hearing. At the general voir dire, when the trial court asked the ninety-six prospective jurors if anyone had heard or read about the case, approximately forty raised their hands. During the State's voir dire, after discussing the case in more detail, twelve more people also indicated that they had heard or read about the case. Four of these people were

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[11] Included in Bronson's qualitative report were summaries of the number of times words such as "death row," "death penalty," and "capital murder" were referenced in the newspaper articles. This analysis did not take into consideration the context in which the words were used. Bronson admittedly did not do a qualitative analysis on words such as "mental retardation" and "child abuse."

excused because they had already formed opinions regarding appellant's guilt. The trial court denied the motion to change venue.

Appellant re-urged his motion after the completion of the voir dire, giving the trial judge an additional barometer of the community climate. Fourteen of the jurors were excused because they had formed opinions that appellant was guilty. All other veniremembers familiar with the case stated they could try the case strictly on the evidence adduced at trial. Appellant used his fifteen peremptory challenges plus two additional challenges granted him by the trial court. Of the twelve jurors selected for trial, five knew nothing about the case; six heard or read very little and none knew of the details or purported facts; and, finally, one had some detailed knowledge but stated that he had formed no opinion and could afford appellant a presumption of innocence. The trial court again denied the motion.

After a careful review of the record, we conclude that appellant has failed to show that publicity created a prejudice so great as to prevent a fair trial. *See Faulder v. State*, 745 S.W.2d 327, 338-39 (Tex.Crim.App. 1987); *Freeman v. State*, 556 S.W.2d 287, 294-96 (Tex.Crim.App. 1977)[12] Further, appellant sets forth no evidence to show that employees of the T.D.C.J. would be inherently biased jurors. It appears that appellant was tried by jurors who had no opinion as to his guilt and that he received a fair trial.

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[12] Overruled on other grounds by *Cuevas v. State*, 641 S.W.2d 558, 560 (Tex.Crim.App. 1982).

As this Court has previously noted:

> Our courts cannot and do not operate in a vacuum. Courts deal with people and crimes which are newsworthy. To require a trial of jurors who had never heard of a highly publicized crime would be impractical if not impossible. Certainly, it was never intended that jurors were to be selected from those who did not read newspapers or keep up with current events through other media. Jurors selected from such a group, if there are enough to be called a group, would not be representative. To hold otherwise would be to hold that the perpetrator of a very highly publicized crime such as the assassination of a president or any widely known person could never be tried.

Morris, 488 S.W.2d at 771-72 (citations omitted).

The trial court did not err in denying appellant's motion to change venue. Point of error 35 is overruled.

VOIR DIRE

In twenty-four points of error (points 36 through 59), appellant complains that the trial court erred at voir dire. The record reveals appellant exhausted all his peremptory challenges and was granted two additional strikes. After his request for more peremptory strikes was denied, appellant identified several venirepersons as objectionable jurors who were seated on the jury. Error, if any, was preserved. *Demouchette v. State*, 731 S.W.2d 75, 83 (Tex.Crim.App. 1986). However, because the trial court granted appellant two additional peremptory strikes, we

can not reverse appellant's conviction unless he demonstrates that the trial court committed error in discharging *three* jurors.[13] *Martinez v. State*, 763 S.W.2d 413, 425 (Tex.Crim.App. 1988); *Rector v. State*, 738 S.W.2d 235, 247 (Tex.Crim.App. 1986). Appellant challenges twelve veniremembers. Because we hold the trial court did not abuse its discretion regarding ten of those venirepersons and because appellant was given two extra peremptory strikes, appellant can show no harm. *See Chambers v. State*, 866 S.W.2d 9, 23 (Tex.Crim.App. 1993). Therefore, we need not address the points of error pertaining to prospective jurors Falknor and Anderson (points of error 45 through 47, 52, 53 and 59).

1. Challenges for Cause

In points of error 36 through 53, appellant posits the trial court erred in overruling his challenges for cause because the venirepersons in question held prejudices against aspects of the law upon which he was entitled to rely. *See* Article 35.16(c)(2). The authorities and standard of review for a challenge for cause are identical to those set out in points of error 126 through 131, *supra*.

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[13] The State contends that appellant did not preserve error because he did not name any objectionable jurors. We disagree. By agreement, no peremptory strikes were taken until after voir dire of the entire venire was complete. Appellant designated his objectionable jurors by requesting extra strikes for particular veniremembers prior to the taking of the peremptory strikes. The trial court denied appellant's request and these veniremembers eventually sat on the jury.

In points of error 36, 37 and 39, appellant argues that prospective jurors Waggoner, Blair, and Lawson could not distinguish between the terms "deliberate," as used in the first punishment issue, and "intentional," the culpable mental state of the crime:

Prospective Juror Waaaoner:

> [By the Prosecutor, after a recitation of various hypotheticals and explanations of the differences between the two terms]: Would you follow the court's instructions and answer this question based on the evidence and not simply because you had already found him guilty? Could you do that?
>
> A. Yeah. I mean, I could do that.
>
> Q. Would you answer [the first special issue] based on the evidence?
>
> A. Yes.
>
> Q. Okay. And just because you found him guilty, you are not going to come along and answer this one yes automatically, are you?
>
> A. No.
>
> * * *
>
> [By Defense Counsel]: When we are talking about special issue number one, let's say, in your mind, do you see that there is – or there is a distinction between intentional versus deliberate?
>
> A. If so, I don't know what it is.
>
> Q. Let me ask you this. If you had gone back and, of course, you realize you don't get to these particular questions until you have already

found somebody guilty of intentionally committing a murder . . . If you had already done that, and just because you had answered that somebody had committed a capital murder, that they intentionally and knowingly killed . . . just because you have answered that he had done this, and he was guilty of that crime, does that mean in and of itself that you automatically answer special issue number one that he deliberately did that?

A. No.

Q. Okay. So, there is a distinction between deliberate and intentional now in your mind?

A. Well, I don't know exactly what it would be. I'm sure there is a fine line.

Q. You just don't know yourself, you can't verbalize it?

A. I mean, if I told someone I intentionally did something, I mean, I could turn around and say I deliberately did it, and I would mean the same thing by it.

Q. In your mind, though, can you think of any situation where there would be a distinction?

A. No.

* * *

Q. Well, the State says intentional in one, or somebody intentionally commits a murder.

A. Right.

Q. Then they turned right back around and they use a different word, deliberate, in special issue number one.

A. Right. I am sure there is a reason for their different terminology.

* * *

Q. You say you still don't see the distinction?

A. No, unless you explain it some other way.

* * *

Q. Okay. Again going back to the special issue, intentional, if you found a person guilty of intentionally committing capital murder, that is, in and of itself, sufficient to you, you don't have to think, if he intentionally did it, that is good enough for me, I can answer special issue number one yes?

A. There is more to it than that.

Q. With the reasonable expectation that the death of the deceased or another would result?

A. Yes. You have to be able to –

Q. Well, if he intentionally killed somebody, wouldn't you think that you could reasonably expect the death of the deceased to result?

A. Yes.

Q. Okay. So, now, back to the same question on intentional. You have answered guilt or innocence, you have found him guilty.

A. If I found him guilty, I would answer number one.

Q. Automatically?

A. No.

Prospective Juror Blair:

[By Defense Counsel]: Alright. And, then, you come back and we have a second part of the trial, where evidence may or may not presented [sic], but, anyway, you have already found that he intentionally committed the particular murder.

A. Yes, sir.

Q. Now, based upon your strong viewpoint, do you believe that the question Number One is automatically answered, just because he intentional [sic] kills somebody, would that be answering Number One, right away?

A. Yes, sir, pretty much.

Q. And, there is no distinction in your mind between deliberate and intentional, they are one in the same, if the man committed a murder in the course of committing some other crime?

A. Yes, sir.

* * *

Q. Question Number One is answered, I don't need any other information, I do not want any, because intentional and deliberate is [sic] one in the same, you guys can sit here and talk about the Legislature, and talk about it all day long, but Question Number One is answered, boom?

A. Basically, unless there is something I just can't think of, I would say yes, sir, that's right, you have no reason to be there.

* * *

[By the State]: Okay. With respect to that, and I gave you probably a poor example of the difference between deliberate and intentional awhile ago, when I said, about the guy holding the pistol, cocked and looks off and sees a little movement and pulls the trigger. That could be compared to a guy facing him with a trigger, with a gun on him, getting the money and he is thinking that he is the only witness here, I ain't going to leave him alive, he gets the money and he goes boom, you know, looking him dead on. You see what I am talking about. Now, you may consider both of those deliberate and both of those intentional, that's not my point, to try to convince you one way or the other. My point is, though, is that there is a distinction, sometimes, or most of the time, maybe both would be true, most of the things that we have been talking about intentional, and likely to be deliberate, and vice versa. What that question though, it does use a different term, and it is worded a little different, and ask you to answer that question based on the evidence, and the fact that the State has a burden of proof on all three of these questions to prove that the answers was [sic] yes, beyond a reasonable doubt, and in order to answer it, you must be convinced by the evidence, not by the fact that you found him guilty earlier, but, by the evidence, and if you were convinced again that it was deliberate and also intentional, so be it, but, could you do that?

A. Yes, sir.

* * *

[By Defense Counsel]: That is why I was asking you the question about intentional versus deliberate. That extreme feeling that you feel is such

that you have told me that you would answer Question Number One automatically, because you already found the man doing that extreme penalty that you feel very deeply about?

A. Here again, I would have to hear the facts, okay? But, I do have a feeling, you know, you shouldn't be there, or you shouldn't be in someone's home or in their store or something. I mean, you shouldn't do that. You know, that's normal, I would think.

* * *

Q. Would there be any real decision upon your part, after having first found somebody guilty, to answering these questions in any other way but the way that you feel?

A. I don't think so. You know, I don't think I would have any problem.

Q. Do you feel like that they would automatically be answered yes?

A. Not if you read the question.

Q. No. In your belief?

A. No, I don't think it would be automatically answered yes.

Prospective Juror Lawson:

[By Defense Counsel]: Okay. If I go up and – it is kind of tricky there, intentionally and deliberately is the same in your mind. In other words, what you are saying, if you have it all set up, and the Legislature goes back and talks about all of these words, but that deliberately and intentional are the same thing, no matter what you guys talked about, in your mind?

A. Yes, sir.

* * *

Q. Is there something that I could give you that would help show you the distinction? Is there some way I can explain it to you different? Mr. Lawyer, you are sitting there all day long and talking at this time about it, you are just splitting hairs, and that doesn't make any sense to me.

A. Well, the way – the only thing I can say, the way the two words are used, based on the same definition, but they are used different, in different ways to the defendant. It all goes back to the same thing.

* * *

Just used different. The same definition to me.

* * *

[By the State]: [W]ith respect to the first issue up there, where it asks about was the conduct done deliberately, would you answer that question based on whatever your definition of deliberate is, but would you answer that question based on the evidence that was before you as opposed to just answering it because you had already found the man guilty? In other words, I find him guilty, I'm going to automatically answer this issue yes. That is one proposition. The other proposition would be, I have found him guilty based on the evidence, and then when I get down to this first issue, I'm going to answer that issue based on the evidence, too. I am not going to answer just because I have found him guilty. Which way would you do that?

A. I will treat this just like the whole trial.

Q. You would answer it just on the evidence?

A. True.

Q. It wouldn't matter that you had already found him guilty or not, you are going to look at the evidence?

A. Look at it as all over the trial.

Q. And you would look at that question, then, I take it, and whatever in your mind deliberate meant, that is what you would do, you would apply it to whatever the evidence was?

A. Yes, sir.

* * *

Q. Okay. But the bottom line is, irregardless [sic] of what definition you attach to the word deliberately, would you answer that first question totally on the evidence, just on the evidence, and not for any other reason? Could you do that?

A. Yes, sir.

* * *

[By Defense Counsel]: Because you have already found that person had already intentionally committed a crime does that mean that you can answer number one automatically yes, because you have already found that he intentionally committed a crime?

A. No, sir.

After reviewing the entire voir dire for each veniremember, it is apparent that they were confused and equivocating in their responses. It is not error for the trial court to deny a challenge for cause to veniremembers

who give equivocating answers on whether they could answer a punishment issue in the negative. *Sattiewhite v. State*, 786 S.W.2d 271, 281 (Tex.Crim.App. 1989). In the instant case, each prospective juror stated that he was capable of following the law and answering the punishment issues impartially. Therefore, we hold the trial court did not abuse its discretion by overruling appellant's challenges for cause. *Id.*; *see also Mooney*, 817 S.W.2d at 701. Points of error 36, 37, and 39 are overruled.

In point of error 38, appellant contends that prospective juror Blair was biased against the law pertaining to special issue three concerning provocation.[14] Appellant asked Blair the following:

> Q. Assuming that you are convinced beyond a reasonable doubt that the defendant deliberately murdered a woman during the course of intentionally raping her and you are convinced beyond a reasonable doubt that he is a violent person, who will pose a threat to society, and there was no mitigating evidence offered on his behalf, assume that when the defendant was raping the woman, she provoked him in some sort of way, anyway, that you can, at all, would anybody ever be able to convince you that it was reasonable for the defendant to respond to the provocation by deliberately taking her life?

After Blair blurted out his negative answer, the State objected that the question was improper because it

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[14] "[I]f raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased." Article 37.071(b)(3).

sought to bind the juror to a specific fact situation. The trial court sustained the objection.

Without deciding whether a defendant may base a challenge for cause on a question sustained as improper, we hold no error occurred here. During the State's voir dire, Blair stated he could follow the law and base his answer to the third special issue on the evidence adduced. The record reflects further that the State was permitted, without objection, to read the indictment to Blair. Given these facts, we cannot say there is anything wrong with Blair visualizing himself as satisfied beyond a reasonable doubt that the defendant's killing of the deceased was not a reasonable response to any provocation. *Cf. White v. State*, 779 S.W.2d 809, 818 (Tex.Crim.App. 1989). Blair did not state, and was not asked, how he would answer given a different fact situation. The trial court did not abuse its discretion. Point of error 38 is overruled.

In points of error 40 through 42, appellant challenges prospective juror Duncan on three separate grounds. Appellant argues that Duncan could not consider his mitigating evidence, that he was unable to disregard illegally obtained evidence, and that he would find any confession admitted in evidence to be voluntary.

In the first of the three challenges, appellant states that Duncan was unable to consider evidence of his mental condition. We disagree. Duncan never stated that he would not *consider* evidence of appellant's mental condition. He merely stated his opinion that he probably would not find the evidence to be mitigating unless it

showed appellant could not distinguish between right and wrong. This Court has stated before:

> In Texas, this mitigating evidence is admissible at the punishment phase of a capital murder trial. Once admitted, the jury may then give it weight, if in their individual minds it is appropriate, when answering the questions which determine sentence. However, "[t]he amount of weight that the factfinder might give any particular piece of mitigating evidence is left to 'the range of judgment and discretion' exercised by each juror."

Johnson, 773 S.W.2d 322, 331 (Tex.Crim.App. 1989), *affirmed in part, Johnson v. Texas*, 113 S.Ct. 2658 (1993) (citations omitted).[15] The trial court did not err. Point of error 40 is overruled.

In his second challenge to the veniremember, appellant maintains that Duncan would not be able to disregard illegally obtained evidence, even if instructed to do so by the trial court. Duncan never unequivocally stated that he would not disregard the evidence; he stated that he "would give it a good shot, but [he] couldn't guarantee that [he] could completely blot it from memory." But later he stated that he would be able to follow the trial

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[15] Appellant cites *Morgan v. Illinois*, 112 S.Ct. 2222, 2234-35 (1992), in support of his argument. However, *Morgan* is not controlling. The Supreme Court held there that "[a]ny juror who states that he or she will automatically vote for the death penalty without regard to the mitigating evidence is announcing an intention not to follow the instruction to consider the mitigating evidence and to decide if it is *sufficient* to preclude imposition of the death penalty." That is not the situation here.

court's instructions. The trial court did not abuse its discretion in overruling appellant's challenge for cause. Point of error 41 is overruled.

His third challenge to Duncan alleges that the juror would consider any confession voluntary merely because the trial court admitted it into evidence over objection. Duncan stated first that he would give some weight to the court's ruling to admit a confession. However, he further stated that he would consider the mental capacity of the person confessing, whether the person understood the language being used, and the person's life history. Duncan never clearly stated that he *could not* disregard such a confession. According deference to the trial court's ruling and upon the record before us, we hold the trial court did not abuse its discretion in overruling appellant's challenge. *See White*, 779 S.W.2d at 820. Point of error 42 is overruled.

Points of error 43 and 48 contend prospective jurors Mangham and Burt would automatically answer special issue three on provocation in the affirmative. During the voir dire examination, the following was elicited from veniremember Mangham:

> Q. [C]an you consider that a killing could be reasonable, yet not be a self-defense issue?
>
> A. No.
>
> Q. Looking at Special Issue No. Three, then, can you think of any sort of factual situation, and, of course, you have to realize that there is now somebody dead, a murder has occurred, because you would have already found somebody guilty, and now you are dealing with this

> on punishment. It reads, "If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased."
>
> Do you think that there is any sort of factual situation at all that you can conceive of, where the killing would not have been – where the killing would have been reasonable by the defendant towards the deceased?
>
> A. No.
>
> Q. And is there anything I can – I can't give you any kind of hypothetical or anything, could I, that would change your mind regarding that particular point?
>
> A. Maybe.
>
> Q. Okay Let's find out. What this is asking you to do is think of, in the process of the murder occurring, is that something that the decedent did which will not rise to the level of self-defense, could have provoked the defendant into committing the murder.
>
> A. Okay.
>
> Q. All right? I don't know if that helps you any, but now, is there anything that you could think of, any factual situation, and stop and think about it, where you could even consider answering that question anything but a simple no answer?
>
> A. Well, looking at it that way, I imagine there is.
>
> Q. You can conceive of a factual situation of some sort?

A. Yes.

Q. Do you have one on your mind right now?

A. No.

Prospective Juror Burt:

Q. Lets go to Special Issue Number Three. I like to focus on that word unreasonable there. Obviously, Mr. Price gave you some examples on that. You already have somebody convicted of capital murder, and so, you would know at that time that it was not self-defense because if it was self-defense, never have a conviction for anything?

A. Right.

Q. Self-defense is not murder. Okay. Can you think of a situation where a killing not in self-defense is truly reasonable?

A. No, I can't.

A veniremember is not challengeable for cause merely because he cannot think of a specific fact situation. *See Hogue v. State*, 711 S.W.2d 9, 27 (Tex.Crim.App. 1986). Mangham stated that he *could* conceive of a fact situation where he would answer special issue three in the negative. *See Harris v. State*, 784 S.W.2d 5, 24 (Tex.Crim.App. 1989). Burt was not questioned further on the issue. Article 35.16(c)(2) provides that a juror is challengeable for cause if "he has a bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely." Neither Mangham nor Burt showed such prejudice. The trial court did not abuse its discretion by overruling appellant's challenges for cause. Points of error 43 and 48 are overruled.

In points of error 44 and 49, appellant claims that the trial court erred in overruling appellant's challenges to prospective jurors Baker and Burt. Specifically, appellant argues that the veniremembers could not consider child abuse in mitigation of punishment and, therefore, were biased against the law upon which he was entitled to rely.

During voir dire, Baker and Burt each stated that they would not consider child abuse to be a mitigating factor. However, each did say that they would follow the court's instructions. Further, Baker later stated that his consideration of child abuse would depend on the "whole history" of the abuse; and Burt stated that she would consider it as "part of the overall picture."

Baker and Burt were not shown to have bias or prejudice against the law. The mere fact that they acknowledged that they believed such evidence deserves little or no weight does not create a sustainable challenge for cause under Article 35.16. *Johnson*, 773 S.W.2d at 331; *Allridge*, 850 S.W.2d 471, 482 (Tex.Crim.App. 1991). Appellant's 44th and 49th points of error are overruled.

In points of error 50 and 51, appellant claims the trial court erred in overruling his challenge for cause to prospective juror Blake. At the conclusion of his voir dire of Blake, appellant stated:

> We will challenge this juror for cause. He violated the Court's order by discussing this case that worked [sic] after he was instructed not to do so, and if he can't follow those instructions, he can't be expected to follow the court's charge. He also indicated that he would have to take the victim impact into account. Further, he indicated that he is less likely to believe Johnny

> than a peace officer. He has already made up his mind about that. That is our challenge for cause on this juror.

In his brief, appellant complains that Blake was biased against him, that Blake would not presume appellant to be innocent, and that Blake would not hold the State to its burden of proof. Because the basis for the challenge during voir dire differed from these complaints made on appeal, appellant has waived any error as to these complaints. *Harris*, 784 S.W.2d at 27.

Appellant also argues under these points that Blake did not follow the trial court's instructions and discussed the case with other people. He argues that this created harm because some of these "people" expressed opinions about the case and made Blake biased against appellant. We have stated before that "[p]rior knowledge of a crime from the news media and community discussion is not sufficient grounds to require that a venireman be excused for cause. The sole question for determination is whether a juror can put aside prior knowledge and opinion and render an impartial verdict." *Kemp v. State*, 846 S.W.2d 289, 298 (Tex.Crim.App. 1992) (citations omitted). After a review of the voir dire, we hold that the record supports the trial court's implicit finding that Blake was capable of discarding any preconceived conclusions he may have had and would follow the law as given to him by the court. *Id.* at 299. The trial court did not abuse his discretion. Points of error 50 and 51 are overruled.

2. Improper Ouestions

In points of error 54 through 59, appellant contends that the trial court erred by refusing to allow him to ask six prospective jurors proper questions during voir dire, thereby preventing the intelligent use of his peremptory strikes.

In *Nunfio v. State*, 808 S.W.2d 482, 484 (Tex.Crim.App. 1991), we held:

> The standard of review in a case where the defendant claims he was improperly restricted on voir dire is whether the trial court abused its discretion. The propriety of the question which the defendant sought to ask is determinative of the issue. We have held that a question is proper if it seeks to discover a juror's views on an issue applicable to the case.

See also Woolridge v. State, 827 S.W.2d 900, 904 (Tex.Crim.App. 1992). However, the trial court does have the authority to impose reasonable restrictions on the exercise of voir dire examination. *Guerra v. State*, 771 S.W.2d 453, 467 (Tex.Crim.App. 1988). The denial of a proper question during voir dire is always reversible error and will not be subject to a harm analysis under rule 81(b)(2) of the Texas Rules of Appellate Procedure. *Nunfio*, 808 S.W.2d at 485.

In point of error 54, appellant complains that the trial court prevented him from inquiring whether venireperson Lawson could distinguish between the terms "intentional" and "deliberate." After questioning by both appellant and the State on the terms relating to special

issue number one, the following occurred during appellant's re-examination of Lawson:

> Q. Because you have already found that person had already intentionally committed a crime, does that mean that you can answer number one automatically yes, because you have already found that he intentionally committed a crime?
>
> A. No, sir.
>
> Q. I'm sorry?
>
> A. No, sir.
>
> Q. Okay. So, in your mind, there now is a distinction between deliberate and intentional?
>
> [By the Prosecutor]: Objection, Your Honor. That is an improper question. Just because he said he would answer that question based on the evidence, doesn't mean that there is a distinction at all.
>
> The Court: Sustain the objection.

Although the State's objection was improper, the question had already been asked and answered when Lawson replied that he would not automatically answer yes to special issue one if appellant were found guilty of intentionally committing the crime. It is within the discretion of the trial court to refuse questions that are duplicitous or unnecessary. *Guerra*, 771 S.W.2d at 467. The trial court did not abuse its discretion. Point of error 54 is overruled.

Appellant argues in point of error 55 that he was not allowed to determine prospective juror Duncan's attitude towards the mentally retarded. The trial court did not

permit appellant to ask Duncan whether persons who are mentally retarded should be allowed to serve on juries. Appellant had previously been allowed to ask Duncan the following questions:

> Q. Do you think that mental retardation might have an effect on the voluntariness of a person's statement given to a peace officer?
>
> * * *
>
> Q. Can you fairly weigh and consider the testimony of that person's mental retardation, on the effect of the mental retardation on the communication skills of those who are so afflicted?
>
> * * *
>
> Q. Do you feel that a person's mental state can be so affected by mental retardation or mental illness that he cannot actually appreciate the gravity of his act, does it seem fair to you that you would consider this evidence in making your decision in determining whether or not the person did anything, has a conscious objective or desire as required by law, or even be the awareness of a reasonable certainty that a death would result?
>
> * * *
>
> Q. Do you think a mental illness can be as debilitating as a physical ailment?
>
> Q. Do you have an opinion as to whether or not mental [sic] retarded persons should be permitted to vote?

Appellant asked various questions pertaining to Duncan's attitude towards mentally retarded persons. As stated before, a trial court does not abuse its discretion by

restricting duplicitous questioning. *Guerra*, 771 S.W.2d at 467. In any case, the prohibited question did not relate to an issue in the case and was, therefore, improper. *Nunfio*, 808 S.W.2d at 484; *Woolridge*, 827 S.W.2d at 904. Point of error 55 is overruled.

In point of error 56, appellant maintains that the trial court prevented him from inquiring whether venireperson McClure would be unduly affected by evidence of any impact the murder had on the victim's family. Appellant asked McClure the following:

> Q. Well, do you feel it is important to consider, in determining whether the sentence should be life or death, any impact, if there was, on the victim's family?

A. Well, I kind of answered that already. When it gets to the same thing, it was something in my family, you know, I think if someone in my family – I have already answered how I feel about it, and any time there is any kind of brutal death, I think that it has a great impact on that family, the immediate family and outside family, too, friends, but I don't know if that would make my opinion looking at this family, I guess it could probably come into my opinion a little, because like I said, I could.

I wouldn't want to put myself in this family's shoes, but I think I could also relate to what they are going through.

Q. Well, do you suppose that any facts that might somehow or another get before you in a trial of a capital murder case, about the victim's family, can you assure us that those facts would not prevent you or substantially impair you

from imposing a life sentence as opposed to a death sentence?

PROSECUTOR: Objection, Your Honor, trying to commit the juror.

THE COURT: Sustain the objection.

Q. It may seem to some that I am trying to commit you, but I am not, really. I am trying to state this fair. Let us assume that you are considering in the penalty phase of any capital murder case, okay? And some of the evidence that has come in shows that the victim's family was greatly impacted and terribly grieved and greatly harmed by the facts.

A. Uh huh.

Q. Okay? Can you assure us that the knowledge of those facts would not prevent you or substantially impair you in considering a life sentence in such a case?

PROSECUTOR: Objection again, he is trying to bind the juror.

THE COURT: Restate just the last part, Mr. Wright. The objection is sustained.

DEFENSE COUNSEL: The question is, Judge –

THE COURT: I understand the question. Restate it.

* * *

PROSECUTOR: I would like to also interject, object to being repetitious. The witness has already answered the question.

We agree that the question had already been asked and answered. *See Guerra, supra.* Furthermore, the question at issue attempted to commit McClure to what his view would be under a particular fact situation. While it is proper to pose hypothetical fact situations to explain the application of the law, it is improper to inquire how a veniremember would respond to particular circumstances. *Cuevas v. State,* 742 S.W.2d 331, 336 n.6 (Tex.Crim.App. 1987). The trial court did not restrict appellant's questioning on the subject matter but rather restricted the form appellant used to ask his question. We conclude the trial court did not abuse its discretion. *See Allridge v. State,* 762 S.W.2d 146, 163-64 (Tex.Crim.App. 1988). Point of error 56 is overruled.

In appellant's 57th point of error, he contends the trial court improperly restricted him from questioning prospective juror Mangham about her potential bias against defense character witnesses:

> Q. Would you give little or no credence to the defendant's character witnesses, if they came to testify as to mitigation of circumstances, just because they were related to the defendant?
>
> PROSECUTOR: Trying to pin the juror as to what she would do in a particular type of evidence.
>
> THE COURT: Sustain the objection. You can restate the question, Mr. Smith.
>
> DEFENSE COUNSEL: Your Honor, I believe that that is a permissible statement under –
>
> THE COURT: Objection sustained. Excuse me.

* * *

> Q. Could you consider a lay witness' testimony about the defendant's mental condition, and that means like a next door neighbor or something like that?
>
> A. No.
>
> Q. Mother or father?
>
> A. Yes.

Appellant's question constituted an attempt to require Mangham to commit herself as to how she would pass upon the credibility of character witnesses prior to trial. *See Guerra,* 771 S.W.2d at 468-69 (police witnesses). The trial court was not limiting appellant's questions in this area but merely restricted the form. As can be seen, when appellant reworded the question to elicit whether Mangham could consider testimony from his relatives, it was not found objectionable. Appellant's 57th point of error is over-ruled.[16]

In point of error 58, appellant complains that he was not allowed to ask whether veniremember Roberts could follow an instruction placing the burden of proof on the State to *disprove* appellant's evidence of mental retardation and child abuse. The State objected to the questions on the ground that they were a misstatement of the law. The trial court sustained the objections and explained

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[16] Appellant relies on *Esterline v. State,* 707 S.W. 2d 171, 174-75 (Tex. App. – Corpus Christi 1986, pet. ref'd), for the proposition that the question at issue here was proper. We disagree. In *Esterline,* the veniremember's answer was challengeable, not the question posited. In fact, *Esterline* does not provide the reader with the question that was asked.

that the law only requires the State to prove each of the special issues beyond a reasonable doubt.

To support appellant's claim that he needed to be able to question Roberts on his ability to follow the proffered instruction on the burden of proof, "it must at least be plausible that the jurors might actually have to follow that instruction." *Spence v. State*, 795 S.W.2d 743, 755 (Tex.Crim.App. 1990). Because appellant's instruction was a misstatement of the law (*see* points of error 83-86, *infra*), we hold the trial court did not abuse its discretion. We also note that appellant was able to ask the following question and get an answer:

> Alright, [w]ell, you feel like it would be fair to require the State to remove any doubt about mental retardation or child abuse beyond a reasonable doubt?

No error is shown. Point of error 58 is overruled.

MISSTATEMENTS OF LAW TO PROSPECTIVE JURORS DURING VOIR DIRE

In point of error 60, appellant argues that the trial court erred in allowing the State to misstate the law to various prospective jurors. Specifically, he complains that the State improperly equated mitigating factors with factors that reduce appellant's *blame* for the crime.

Appellant's complaint is without merit. A review of the voir dire examination reveals that, although the State defined "mitigating" in limited terms, defense counsel had the opportunity to cross-examine each veniremember regarding the meaning of mitigating. Further, the trial court instructed each juror prior to his individual voir

dire that anything the attorneys said could not be considered as evidence, and also defined the term "mitigating" in the court's charge.[17] Any error in the State's earlier definition was, therefore, harmless. *See Adanandus v. State*, 866 S.W.2d 210, 225 (Tex.Crim.App. 1993). Point of error 60 is overruled.

Point of error 61 avers that the trial court erred in allowing the State to incorrectly tell prospective jurors that "deliberate" is not necessarily distinct from "intentional."

Appellant made no objection to the State's definition during voir dire.[18] Therefore, he has preserved nothing for our review. Tex. R. App. Proc. 52(a); *Draughon v. State*,

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[17] The trial court charged:

> A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue.

[18] Appellant did file an objection regarding this point of error in a written motion to change venue. This written motion was not filed until fifteen days after the last complained-of juror was questioned. We further note that appellant's point of error is completely unfounded. In each complained-of incident, the State merely stated that sometimes "intentional" and "deliberate" may seem to be the same, but that under the law there is a distinction.

831 S.W. 2d 331, 336-37 (Tex.Crim.App. 1992). Point of error 61 is overruled.

In appellant's 62nd point of error, he complains that the State used an improper hypothetical example of an intentional killing during its general voir dire and the individual voir dire of several veniremembers. Appellant points to only one veniremember, Guidry, apparently the last one with whom the State used the complained-of hypothetical. Appellant concedes that he failed to object during the general voir dire and the previous individual voir dire. Therefore, appellant has preserved error for our review only with regard to veniremember Guidry. *See* Tex. R. App. Proc. 52(a); *Johnson*, 803 S.W.2d at 291.

The State posed the following hypothetical to veniremember Guidry:

> When I get to give you an example, say you got a murder in the course of an armed robbery, and it occurs as follows: You've got an individual. He goes into a convenience store to rob it, and he has got a gun. He walks up to the counter, cocks the gun, and just sticks it right in the clerk's face, and says, you know, give me the money, this is a stick-up. About that time, let's say that he heard a noise out the front door, that he may have thought was a customer driving up or whatever, and he looked out the front door, holding the gun cocked on the clerk at the same time, and he is looking out the front door, and he sees a movement out of the corner of his eye. He never even turns his head back around, just pulls the trigger, boom, instinctively. The clerk maybe was just reaching for the money, like he had told him to, but all of this happened real

> quick, looks out the front door, sees a movement, pulls the trigger. Okay? He intended to fire the gun, so a jury might find him guilty of capital murder because he intentionally shot the clerk. He intended to do that because at the moment he fired, he had the conscious desire to fire that gun, it was not an accident. You see what I'm talking about? But it didn't require hardly any thought at all, almost a reflex response.

Appellant objected that this was an improper hypothetical, but the trial court overruled the objection. Appellant cites *Morrow v. State*, 753 S.W.2d 372 (Tex.Crim.App. 1988), in support of his position.

In *Morrow*, the State posed a hypothetical question which was intended to demonstrate the difference between a murder that is committed intentionally and one that is done deliberately. However, the hypothetical, as represented by the State, could not constitute capital murder under Texas Penal Code § 19.03(a)(2):[19] a man robs a convenience store and intentionally shoots a person in the knee; the person later dies of medical complications or bleeds to death. *Morrow*, 753 S.W.2d at 373-375.

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[19] Article 19.03(a)(2) of the Texas Penal Code reads:

> (a) A person commits an offense if he commits murder as defined under Section 19.02(a)(1) of this code and:
>
> * * *
>
> (2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault or arson.

The example failed to suggest that the accused had any intent to murder his victim. We held such a representation could only give a veniremember the impression that any intentional act indirectly causing the death of a victim during a robbery will raise the crime to capital murder. *Id.* at 375; *see also Lane v. State*, 743 S.W.2d 617, 619-29 (Tex.Crim.App. 1987) (robber intentionally fires shot into the ceiling and it ricochets, killing someone); *Gardner v. State*, 730 S.W.2d 675, 686-87 (Tex.Crim.App. 1987) (robber intentionally shoots man in the leg, and man later dies).

Unlike the hypothetical in *Morrow*, the hypothetical posed here is a proper example of both murder, Texas Penal Code § 19.02 (a)(1), and capital murder, Texas Penal Code § 19.03(a)(2). It can be inferred that an accused who, during the course of a robbery, intentionally shoots his victim in the face, had the conscious objective or desire that death should result. *See* Tex. Penal Code § 6.03(a) (definition of "intentional"). The death did not indirectly occur. We find no error in the State's hypothetical. Point of error 62 is overruled.

In point of error 63, appellant complains that the State erroneously stated that a prospective juror could decide not to consider mental retardation as a mitigating circumstance. The State asked veniremember Gillaspie the following question:

> If mental retardation were presented to you, as a mitigating factor, and I am not going to even ask whether or not you consider that a mitigating factor because I would think that first of all, it would be important to know what type of crime was involved to start with, but, secondly, would you feel like it would be important to know the degree or to have evidence on the extent of the retardation?

Appellant failed to object to this question. Therefore, he has failed to preserve any error for our review.[20] Tex. R. App. Proc. 52(a); *Johnson*, 803 S.W.2d at 291. Point of error 63 is overruled.[21]

Appellant's 64th point of error avers that the trial court used a flawed proposed mitigation instruction during voir dire that was not used at punishment, and, therefore, appellant was unable to conduct his jury selection properly.

The sample instruction given by the trial judge to the prospective jurors stated the following:

> If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to that special issue under consideration.

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[20] Appellant miscites the record on appeal. The objection he claims preserved the alleged error was, in reality, an objection to a different question regarding child abuse.

[21] Appellant cites *Trevino v. State*, 815 S.W.2d 592, 614 (Tex.Crim.App. 1991), for the proposition that youth is a mitigating factor that must be considered as a matter of law. This Court has subsequently held that the law does not require a juror to consider youth as a mitigating factor; a juror may consider youth to be *either* mitigating or aggravating. *Robertson v. State*, 871 S.W.2d 701, 712 n.13 (Tex.Crim.App. 1993).

The instruction given at punishment stated:

> If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

There was no significant difference between the two instructions. Because we have held that the instruction given at punishment was proper (points of error one through eleven, *infra*), we hold the sample instruction used during voir dire was also proper.

As to appellant's contention that the differing instructions somehow harmed him during jury selection, no objection was ever made. Therefore, appellant has waived any error. *See* Tex. R. App. Proc. 52(a); *Johnson*, 803 S.W.2d at 291. Point of error 64 is overruled.

SEARCH

In appellant's 71st point of error, he complains that the trial court incorrectly granted the State's motion for neurological testing. He further argues that the admission of information obtained from the testing violated his rights under the Fourth Amendment to the U.S. Constitution and Article I, section 9 of the Texas Constitution. Appellant, in both phases of the trial, raises the issue of his mental status through evidence regarding mental retardation, organic brain damage, and his I.Q. The State in countering this assertion argues that the evidence was

necessary to combat appellant's claimed brain dysfunction and requested a search warrant in order to gain the following information:

> (1) The determination and diagnosis of this defendant's mental condition at all times relevant to these proceedings; (2) To determine the existence and/or extent of any brain dysfunction and its effects upon the defendant's mental status, and intent; (3) To determine the defendant's true neurological condition as, it may bear upon the issues of voluntariness, ability to comprehend legal issues, ability to voluntarily reform conduct to the requirements of the law, the intent required to commit the offense charged and as same may have a bearing upon any mitigating or aggravating evidence as well as the likelihood of the defendant to commit future acts of violence and constitute a continuing threat to society.

Article 18.02 sets out the grounds for issuance of a search warrant. Appellant argues that the only feasible ground of issuance in the instant case can be found in Article 18.02(10): "property or items, except personal writings by the accused . . . constituting evidence of an offense or constituting evidence tending to show that a particular person committed an offense." He asserts that neurological testing does not fit within the article.

Neurological testing is a *tool* used to determine a person's mental status and is equated with testing of a psychiatric or psychological nature. Further, mental status is relevant to a person's competency to stand trial and his personal culpability. Therefore, the trial court properly ordered the tests under *Estelle v. Smith*, 452 U.S. 454,

465 (1981).[22] Appellant's rights under the Fourth Amendment and Article I, section 9 were not violated.

Because the trial court properly ordered the tests under *Estelle v. Smith*, we need not consider whether article 18.02 is applicable.[23] Point of error 71 is overruled.

CONFESSIONS

In points of error 66 through 70, appellant argues that the trial court erred in finding his confessions voluntary at the pre-trial suppression hearing and then admitting them during both phases of the trial. He maintains that given his mental impairment, he did not understand the warnings given to him and that he did not make a knowing, voluntary, and intelligent waiver under *Miranda* and

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[22] "When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. . . . (A) defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist." *Estelle v. Smith, supra.* Because neurological testing is a tool to determine a person's mental status, it falls within the realm of a sanity examination and is properly ordered by the court. *See also Buchanan v. Kentucky*, 483 U.S. 402, 422-25 (1987) (extreme-emotional-distress defense).

[23] It is well established that "[i]f the decision is correct on any theory of law applicable to the case it will not be disturbed." *Calloway v. State*, 743 S.W.2d 645, 652 (Tex.Crim.App. 1988); *Romero v. State*, 800 S.W.2d 539, 543 (Tex.Crim.App. 1990).

Article 38.22.[24] He asserts finally that his Fifth Amendment rights were violated because the officers did not effectively communicate the statutory warnings to him.

At a suppression hearing, the trial court is the sole judge of the credibility of witnesses and the weight of their testimony. *Romero v. State*, 800 S.W.2d 539, 543 (Tex.Crim.App. 1990). Therefore, if the record supports the trial court's findings, we will not disturb those findings. We only consider whether the trial court applied the law to the facts properly. *Id.*

Article 38.21 provides that a statement of an accused may be used in evidence against him if it appears that it was freely and voluntarily made without compulsion or persuasion. The determination of whether a confession is voluntary is based on an examination of the totality of

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[24] Appellant was given his warnings consistent with Article 38.22. The Article 38.22 warnings state:

> (1) [The accused] has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;
>
> (2) any statement he makes may be used as evidence against him in court;
>
> (3) he has the right to have a lawyer present to advise him prior to and during any questioning;
>
> (4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning;
>
> (5) he has the right to terminate the interview at any time.

The Texas statutory warnings are in compliance with *Miranda v. Arizona*, 384 U.S. 436 (1966).

circumstances surrounding its acquisition. *Griffin v. State*, 765 S.W.2d 422, 429 (Tex.Crim.App. 1989).

Mental deficiency is a factor, but not alone determinative, in ascertaining the voluntariness of a confession and the waiver of the Fifth Amendment privilege against self-incrimination. *Smith v. State*, 779 S.W.2d 417, 429 n. 8 (Tex.Crim.App. 1989); *see also Casias v. State*, 452 S.W.2d 483, 488 (Tex.Crim.App. 1970). In analogous cases of mentally-slow or retarded defendants, this Court has found confessions to be voluntary. *See Casias*, 452 S.W.2d at 488 (confession admissible even though defendant had I.Q. of 68, was illiterate, and had mental age of eight to ten years); *White v. State*, 591 S.W.2d 851, 858 (Tex.Crim.App. 1979) (confession admissible even though defendant was borderline mentally retarded); *Grayson v. State*, 438 S.W.2d 553, 555 (Tex.Crim.App. 1969) (statements admissible from a defendant with an I.Q. of 51 and mental age of six years).

The following evidence was elicited regarding the two written confessions: Officer Billy Ray Nelson, present at appellant's arrest,[25] testified that he was familiar with appellant. He stated that he had had conversations with appellant and that appellant seemed to be of normal intelligence. Nelson was present when Officer Bob Grissom first read appellant his statutory rights at the scene of the arrest. He confirmed that Grissom read appellant

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[25] Prior to his arrest, appellant voluntarily accompanied the police to the victim's home. While there, without any prompting by the police, appellant orally confessed to the crime.

each of his rights and asked appellant whether he understood those rights. Appellant responded that he did.

Appellant was then brought before Judge Garnet Galloway, who advised appellant of the charge against him, again read him his rights, and set bond. Galloway verified that appellant understood his rights. Further, appellant's father was present and also read appellant his rights. His father then asked him whether "he did it." Appellant replied that he did.

Appellant next gave his statement to Chief William F. Smith.[26] Prior to taking his statement, Smith again read appellant his statutory rights and asked whether he understood each right. Smith then asked whether appellant wished to give a statement. Appellant replied that he did. The statement took approximately three hours. After he completed his statement, appellant told Smith that he could not read or write.

In order to confirm that appellant's statement was correct, Smith brought in two civilians off the street to witness the reading and signing of the statement. The entire statement, including another recitation of the statutory warnings, was read to appellant in the presence of the two witnesses. Appellant was then given the opportunity to make any changes to his statement before he signed it.

A second, more-detailed confession was taken the next day by Texas Ranger Maurice Cook. Cook read the statutory warnings to appellant, made sure that appellant

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[26] District Attorney Joe Price was also present. Price was also in attendance for the second confession.

understood the meaning of "lawyer," "urge," and "trial," and generally explained the warnings in basic terms. At one point, Cook even exaggerated a fact from the previous day's confession to see whether appellant would correct him. Appellant did. Appellant was questioned for about five hours during the second confession, but was given "hamburgers and cokes" during that time. Again, two people were brought in to witness the reading and signing of the statement. Statutory warnings were again given to appellant at this time.

Dr. Windall Dickerson, a psychologist for the defense, testified that he believed appellant did not voluntarily waive his rights because appellant could not comprehend the consequences of that waiver. In Dickerson's opinion, appellant is a severely limited, mentally retarded individual. He noted appellant's I.Q. scores ranged from the forties to the seventies and that appellant had very poor judgment. He testified that many retarded people attempt to answer what they think others want to hear in order to appear smarter. Further, he stated that without further explanation, appellant could not have understood the statutory warnings.

In addition to the evidence elicited at the hearing, the trial court took judicial notice of all evidence from the 1980 suppression hearing in which the confessions were found voluntary; the prior testimony of Dr. Felix Peebles; and the finding of competency from appellant's first trial. There was no evidence of governmental coercion.

Appellant argues that the State did not meet its burden of showing that the confessions were voluntary because no evidence was presented to rebut Dickerson's

testimony that the officers inadequately explained appellant's rights to him. Specifically, he maintains that the officers should have done extensive follow-up questioning and elicited explanations from him in his own words to ensure that his statements were voluntary. However, appellant presents no case law to suggest that the officers were obligated to follow these procedures, and we find that there was no such obligation under these circumstances.[27]

The record shows appellant was advised of his statutory rights, he understood them, and voluntarily waived them before making his statements. The confessions were written as appellant related his story, and they were read to him before he signed them. Appellant's evidence of mental retardation and illiteracy does not, standing alone, render his confessions inadmissable. *See Casias*, 452

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[27] Appellant cites *Farr v. State*, 519 S.W.2d 876, 880 (Tex.Crim.App. 1975), and *Sherman v. State*, 532 S.W.2d 634, 636 (Tex.Crim.App. 1976), in support of his argument. However, neither case is applicable. In both *Farr* and *Sherman*, the confessions were found inadmissible because the defendant had presented evidence that he was *coerced* into confessing by the interrogating officers. There is no evidence of official overreaching in this case. We further note that official coercion is relevant to a Fourteenth Amendment due process analysis. We are unsure whether appellant is making a separate Fourteenth Amendment argument. However, if he were, it would have to be rejected. Coercive police activity is a necessary predicate to the finding that a confession is not voluntary within the meaning of the Due Process Clause of the Fourteenth Amendment. *Colorado v. Connelly*, 479 U.S. 157, 167 (1986). Further, a defendant's mental condition, by itself and apart from its relation to official coercion, will never require a conclusion of involuntariness. *Id.* at 164.

S.W.2d at 488; *White*, 591 S.W.2d at 858; *Grayson*, 438 S.W.2d at 555. The bulk of the evidence shows that appellant had the basic reasoning skills necessary to understand the warnings. We hold that the trial court did not err by overruling appellant's motion to suppress and admitting his confessions into evidence. Points of error 66 through 70 are overruled.

In points of error 89 through 102, appellant complains that the trial court improperly instructed the jury regarding the voluntariness of the confessions. Because appellant offered evidence that he was mentally retarded, he claims he raised an issue of fact as to whether the confessions were voluntary. Therefore, he asserts, the trial court was required to instruct the jury on the issue of voluntariness. *See* Article 38.22, §§ 6 & 7; *Rogers v. State*, 549 S.W.2d 726, 729 (Tex.Crim.App. 1977). An instruction on the voluntariness of appellant's confession was given in the jury charge at guilt/innocence.[28]

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[28] The instruction stated:

> You are instructed that under our law a confession of a defendant . . . shall be admissible in evidence if it appears that the same was freely and voluntarily made, without compulsion or persuasion, provided, however, that it be made in writing and signed by the accused, and show that the accused has been warned prior to making such statement or confession, by the person to whom the same is made that: [Statutory warnings]
>
> So in this case, if you find from the evidence, or if you have a reasonable doubt thereof, that prior to the time the defendant gave the alleged statement or confession to Chief of Police Bill Smith, if he did give it, the said Chief of Police Bill Smith did not warn the defendant in the respects just out-lined, or as to any one of such requirements just outlined, then you will wholly disregard the alleged statement or confession and not consider it for any purpose nor any evidence obtained as a result thereof. If, however, you find beyond a reasonable doubt that the aforementioned warning was given the defendant prior to his having made such statement, if he did make it, still, before you may consider such statement as evidence in this case, you must find from the evidence beyond a reasonable doubt that prior to and during such statement, if any, the defendant knowingly, intelligently and voluntarily waived the rights hereinabove set out in the said warning, and unless you so find, or if you have a reasonable doubt thereof, you will not consider the statement or confession for any purpose whatsoever or any evidence obtained as a result of same.

An identical paragraph applicable to the confession made to Texas Ranger Maurice Cook followed.

Points of error 90, 92, 93, 98, 101 and 102 each pertain to the trial court's failure to instruct the jury at the punishment phase on the voluntariness of appellant's confession. In appellant's prior case, this Court held that, although a defendant does have the statutory right to have the issue of voluntariness submitted to the jury, he is not entitled to have it *resubmitted* at the penalty phase when such issues have already been submitted at guilt/innocence. *Penry v. State*, 691 S.W.2d 636, 652 (Tex.Crim.App. 1985), *rev'd on other grounds, Penry v. Lynaugh, supra.*

Under the doctrine of the law of the case, where determinations as to questions of law have already been made on prior appeal to a court of last resort, those

determinations will generally be held to govern the case throughout all of its subsequent stages. *Ex parte Granger*, 850 S.W.2d 513, 516 (Tex.Crim.App. 1993). This issue having been previously decided adversely to appellant, his points of error are overruled.

In point of error 89, appellant complains that the trial court erred in failing to instruct the jury on the meaning of the word "intelligently." He objected to the court's charge because it failed to define "intelligently" so as to require "an appreciation of the significance of the relinquishment of those [statutory] rights in a mature and meaningful way." He argues that the jury charge did not require any substantial mental capacity for a waiver of his rights, and thus harmed him by allowing the jury to determine that he had made a valid waiver when he did not have the necessary intelligence.

The Supreme Court has said that waivers must not only be voluntary, but must also constitute a knowing and intelligent relinquishment of a known right or privilege, taking into account the background, experience, and conduct of the accused. *Edwards v. Arizona*, 451 U.S. 477, 482 (1981). In Texas, waiver of the rights defined in the warnings set out in Article 38.22[29] must be made "knowingly, intelligently, and voluntarily." Article 38.22. Neither the Supreme Court nor the statute requires any definition of the terms found therein.

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[29] The Article 38.22 warnings encompass the Miranda warnings and one additional warning. *See* n. 19, *supra*.

"Where terms used are words simple in themselves and are used in their ordinary meaning, jurors are supposed to know such common meaning and terms, and under such circumstances such common words are not necessarily to be defined in the charge to the jury." *Russell*, 665 S.W.2d at 780. In this context "intelligently" is used in its ordinary sense. Jurors are expected to decide whether appellant had an intelligent understanding of his statutory rights, given the available evidence. Appellant erroneously concludes that he must also be found to have had an intelligent understanding of the repercussions of waiving his rights. While a defendant must be instructed that his statements can be used against him in court, the Supreme Court has stated that he need not realize all the possible consequences of the waiver for it to be found to be knowing and intelligent. *Colorado v. Spring*, 479 U.S. 564, 574-75 (1987); *Moran v. Burbine*, 475 U.S. 412, 422-23 (1986). The jury was entitled to give the term its common and ordinary meaning. Point of error 89 is overruled.

In point of error 91, appellant argues that the trial court erred in failing to instruct the jury that the statutory warnings must have been "effectively communicated" to appellant. He also complains of the trial court's failure to define the word 'warn' as used in the charge. Appellant's "Objection No. 8" stated:

> The Defendant objects to the charge of the Court concerning the giving of warnings in connection with the custodial interrogation of an accused in that it fails to instruct the jury that the officer taking the statement must effectively communicate each of the warnings to the accused in order to obtain a lawful custodial confession,

and that the statement must be disregarded for failure to do so.

We note initially that appellant's objection below did not complain about the trial court's failure to define "warn" in the charge. Therefore, that particular issue is not preserved for our review. Tex. R. App. Proc. 52(a); *Barnes*, 876 S.W.2d at 325; *Johnson*, 803 S.W.2d at 293.

With respect to appellant's other argument, he contends that the officers should have taken more care in giving the warnings to him because he was obviously mentally deficient. Therefore, given his mental handicap, he argues, the jury should have been instructed that the warnings must have been "effectively communicated" to him.

The trial court instructed the jury not to consider appellant's statements for any purpose unless they found he had been given the proper warnings, and had "knowingly, intelligently, and voluntarily" waived his statutory rights. This instruction was a correct statement of the law on the admissibility of appellant's confession. *Bell v. State*, 582 S.W.2d 800, 812 (Tex.Crim.App. 1979). The trial court did not err in overruling appellant's objection because the court had already fully instructed the jury on the applicable law. *Id*. Point of error 91 is overruled.

In point of error 94, appellant argues that the trial court erred in refusing to instruct the jury that his confession should not be considered if they believed, or had a reasonable doubt, that appellant was so mentally deficient as to be incapable of under standing the nature and effect of his confession. Appellant claims the requested instruction asked the jury to take his mental retardation

into account in regard to the voluntariness of his confession, and that the trial court had an obligation to instruct the jury on this relevant legal issue.

Article 36.14 states that a jury charge should set forth the applicable law of the case without expressing an opinion on the weight of the evidence, summing up the testimony, or discussing the facts or using jury argument to arouse the sympathy or excite the passions of the jury. When the trial court properly instructs the jury on the issue of voluntariness, a special instruction singling out the issue of mental retardation would be an improper comment on the weight of the evidence. *Bell*, 582 S.W.2d at 812.

Here, the trial court properly submitted the voluntariness issue to the jury, requiring that before considering the confession, the jury had to find beyond a reasonable doubt that all the proper warnings were given prior to appellant's statement, that the statement was freely and voluntarily made, and that appellant knowingly, intelligently, and voluntarily waived his rights before and during the making of the statement. Therefore, it would have been an improper comment on the evidence for the court to include the issue of mental retardation in the charge. Appellant's argument concerning his mental retardation should have been (and was) argued to the jury during closing arguments. Appellant's point of error is overruled.[30]

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[30] Appellant also argues that he was entitled to this instruction because a defendant is entitled to an affirmative submission on every defensive theory raised by the evidence. *See Hill v. State*, 585 S.W.2d 713, 714 (Tex.Crim.App. 1979).

In point of error 95, appellant argues that the trial court erred in refusing to instruct the jury not to consider his confessions if they believed appellant was induced to confess by the promise made by Ted Everett, an investigator for the District Attorney's office. Everett promised appellant he would not "put anything on [him] that [he] did not do." Appellant argues that, given his mental status, this promise by Everett could have misled him to believe he could "say nearly anything" to the interrogating officers and Everett would "correct things for him later."

If a promise made by a person in authority induced a confession, then that confession is inadmissible. *Alvarez v. State*, 649 S.W.2d 613, 620 (Tex.Crim.App. 1982). Generally, the determination of the voluntariness of the confession depends on the totality of the circumstances surrounding the confession. *Id.* However, before a promise will render a confession inadmissible, the promise must be shown to have induced the confession because it was positive for the defendant, made or sanctioned by someone in authority, and of such an influential nature that appellant might speak untruthfully in response. *Muniz v. State*, 851 S.W.2d 238, 254 (Tex.Crim.App. 1993). In our review, we look to whether the circumstances of the promise would reasonably induce a defendant to

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However, *Hill* is inapplicable to the instant case. The refusal of a defendant's requested instruction is not error where the requested instruction is merely an affirmative submission of a defensive issue which denies the existence of an essential element of the State's case. *Green v. State*, 566 S.W.2d 578, 584 (Tex.Crim.App. 1978).

admit to a crime he did not commit. *Sossamon v. State*, 816 S.W.2d 340, 345 (Tex.Crim.App.1991).

Everett described the conversation with appellant as follows:

> I asked him if he would go with us back downtown, to which he replied, yes, I will, if you will promise me one thing, and I said, well, what is that, Johnny, and he said if you will promise me that you won't try to hang anything on me that I didn't do, and I said, well, Johnny, you know me better than that, I am not going to do that, and he said okay, I will do it.

Here, Everett merely promised not to charge appellant with a crime he did not commit. There is no reason to believe that, in response to this promise, even a mentally retarded person would have expected Everett to protect him from prosecution for a crime he freely admitted. Furthermore, the promise was made in response to Everett's request that appellant accompany him downtown. No connection was expressed or implied to the later questioning by Chief Smith and Ranger Cook or any other potential confession by appellant. It does not follow that this promise could have reasonably induced appellant to confess to a crime he did not commit.

The totality of the circumstances does not indicate that this promise in any way eroded the voluntariness of appellant's statements. Therefore, appellant was not entitled to his requested instruction. *See Hernandez v. State*, 819 S.W.2d 806, 812 (Tex. Crim.App. 1991). Point of error 95 is overruled.

In points of error 96 and 97, appellant argues that the trial court should have instructed the jury that an independent voluntariness determination must be made separate from the determination that warnings were given and *Miranda* rights were waived. He says the jury charge did not clearly explain that the confession must be found voluntary whether or not *Miranda* warnings were given. We disagree.

The instructions given to the jury for each confession clearly set forth two conditions which must be met before the jury may consider those confessions as evidence. *See* footnote 24, *supra*. The first condition concerned the giving of the Article 38.22 statutory warnings. If that condition was met, the jury was instructed that "before you may consider such statement as evidence in this case, you must find from the evidence beyond a reasonable doubt that prior to and during such statement, if any, the defendant knowingly, intelligently and voluntarily waived the rights. . . . "

Appellant further complains that the term "appears" in the first paragraph of the instruction makes the charge ambiguous. The instruction states: "You are instructed that under our law a confession of a defendant . . . shall be admissible in evidence if it *appears* that the same was freely and voluntarily made . . . " This language complies with Article 38.21. Appellant views the charge piecemeal, whereas this Court views it as a whole. The charge was not ambiguous and clearly delineates between the *Miranda* and voluntariness requirements. *See Bell*, 582 S.W.2d at 812; *Burdine v. State*, 719 S.W.2d 309, 320

(Tex.Crim.App. 1986). Points of error 96 and 97 are overruled.[31]

In points of error 99 and 100, appellant argues the trial court erred in failing to instruct the jury not to consider the truth or falsity of appellant's confessions in deciding whether they were voluntary and admissible. Appellant further argues that the State, in its argument to the jury, emphasized the reliability of the confessions with the implication that it counteracted appellant's evidence that his confessions were not voluntary. Appellant contends that his mental retardation makes this error particularly egregious because the jury was discouraged from fully evaluating the impact of appellant's mental impairment on the voluntariness of his confession.

Appellant made no objection on these grounds to the State's argument at trial; therefore, he did not preserve the issue of the alleged jury argument error. Tex. R. App. Proc. 52(a).

In addition, we find no oral or written objections by appellant on these grounds to the jury charge. If no objection is made at trial, a jury charge will be reversed only for error which created so much harm that appellant

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[31] Appellant argues further that his confessions were involuntary because he did not understand, and was not informed, that a conviction for capital murder could result in a death sentence. However, failure to inform an accused of the full extent of his possible exposure under the law goes to the knowing and intelligent nature of the *Miranda* waiver, not to its voluntariness. *Corwin v. State*, 870 S.W.2d 23, 32 (Tex.Crim.App. 1993). Therefore, appellant's failure to understand that he could receive the death sentence does not render his confessions involuntary.

was denied a fair trial. *Almanza v. State*, 686 S.W.2d 157, 171 (Tex.Crim.App. 1985).

In this case, appellant was allowed to present evidence of his mental impairment to the jury, and the trial court gave an instruction on voluntariness which accurately described the law. Points of error 99 and 100 are overruled.

GUILT/INNOCENCE PHASE

In points of error 75 and 76, appellant posits that the trial court erred by allowing State's witnesses Cindy Peters and Dr. Edward McClendon to testify over objection about statements made by the deceased before her death. Appellant asserts that the statements were hearsay and violated his right to confrontation under the Sixth Anendment.[32]

The issue pertaining to the testimony of Cindy Peters has already been addressed by this Court. *Penry v. State*, 691 S.W.2d at 646-47. We held that the deceased's statement to Peters was admissible as a spontaneous exclamation. *Id.* at 647. We also held that appellant's constitutional rights under the confrontation clause were not violated because the deceased was unavailable and the statement bore adequate indicia of reliability, *Id.*

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[32] Appellant further avers that his rights under the Eighth and Fourteenth Amendments were also violated. However, appellant makes no argument nor cites us to any authority. Thus, this proposition is inadequately briefed and not properly presented for our review. Tex. R. App. Proc. 74(f).

Under the doctrine of the law of the case, where determinations as to questions of law have already been made on prior appeal to a court of last resort, those determinations will generally be held to govern the case throughout all of its subsequent stages. *Ex parte Granger*, 850 S.W.2d at 516. This issue having been previously decided adversely to appellant, his 76th point of error is overruled.

In point of error 75, appellant complains about the testimony elicited from Dr. McClendon, the emergency room physician who treated the victim. McClendon testified that the deceased stated that she had been raped and gave him a description of her attacker:

> I asked her, you know, if this was a white man, and she said yes, and then, I asked what color his hair was and she told me it was black. I asked her, I asked about his size, and she said he was slim built and short.

Both appellant and the State concede that these were hearsay statements. *See* Rule 801(d).[33]

Appellant posits that these statements were inadmissable under the "medical treatment" exception to the hearsay rule because McClendon admitted he asked the deceased some questions, "I guess, for information. . . . " *See* Rule 803(4). Further, he states that neither statement could meet the "dying declaration" exception to the hearsay rule because the deceased's medical condition was stabilized for a short time in the emergency room. *See*

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[33] Unless otherwise indicated, all references to rules are to those in the Texas Rules of Criminal Evidence.

Rule 804(b)(2). We need not address these contentions, however, because the statements were properly admitted as "excited utterances" under Rule 803(2).[34]

An excited utterance is any "statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Rule 803(2). While the period of time that elapsed between the occurrence of the startling event and the making of the statement is a factor to consider in determining the admissibility of such statements, the critical factor is whether the declarant was still dominated by the emotions, excitement, fear, or pain of the event. *McFarland v. State*, 845 S.W.2d 824, 846 (Tex.Crim.App. 1992).

A review of the record shows a startling event occurred in the instant case. The deceased was delivered to the emergency room approximately thirty to forty-five minutes after being stabbed. She had a sucking chest wound, a collapsed lung, a ruptured kidney, bruises to her face and side, and was bleeding profusely. She was not permitted any pain medication and she died within one and a half hours of her arrival. It is apparent to us that the deceased was still under the physical and emotional stress of the assault when she made the statements

[34] The trial court did not state the grounds upon which he admitted the statements. However, the trial court's decision will be upheld if it is correct on any theory of law applicable to the case. *Romero v. State*, 800 S.W.2d 539, 543 (Tex.Crim.App. 1990).

about which appellant complains. *Id.* Finally, both statements made related to the circumstances of the startling occurrence. *Id.*[35]

Appellant's contention that his Sixth Amendment right to confrontation was violated must also fail. The confrontation clause requires a showing that a hearsay declarant is unavailable and that the statement bears adequate "indicia of reliability." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). Reliability may be inferred where the evidence falls within a firmly rooted hearsay exception. *Id.*

As we held in *Penry v. State*, the deceased was obviously unavailable and the "excited utterance" exception to the hearsay rule is "old and firmly rooted." 691 S.W.2d at 647. The trial court did not err in admitting the statements. Point of error 75 is overruled.

In points of error 72 through 74, appellant complains of various photographs entered into evidence.[36] He asserts that the photographs were irrelevant and introduced solely to prejudice the jury.

A photograph is relevant if it has "any tendency to make the existence of any fact that is of consequence to

[35] We note that we would also find the statement admissible under the "dying declaration" exception. Rule 804(b)(2); *Herrera v. State*, 682 S.W.2d 313, 320 (Tex.Crim.App. 1984).

[36] At trial, appellant objected to the admission of State's exhibit 5, one of the above-mentioned photographs, only on the basis of relevance and victim impact. Since his trial objection failed to make a Rule 403 objection, he has not preserved that issue for our review. Tex. R. App. Proc. 52(a); *Barnes*, 876 S.W.2d at 325.

the determination of the action more probable or less probable than it would be without the evidence." Rule 401. The admission into evidence of photographs is within the discretion of the trial court and will not be disturbed absent an abuse of that discretion. *Moreno v. State*, 858 S.W.2d 453, 463 (Tex.Crim.App. 1993). Our review shows that the trial court was justified in finding the evidence relevant to material issues in the case.

The identity of the victim and the manner and means of death are certainly facts that are of consequence to the determination of the action. *Long v. State*, 823 S.W.2d 259, 271 n.18 (Tex.Crim.App. 1991). State's exhibit 65, a portrait of the deceased, was introduced during the testimony of Bruce Carpenter, her former husband. The portrait was relevant to prove up the identity of the deceased. State's exhibits 52, 54A, 55A, and 56A depict the deceased's body at the autopsy. These were relevant to show the means of death and various other injuries sustained. State's exhibit 5 is a photograph of the deceased's small dog. The photo is relevant because it corroborated appellant's confession wherein he stated that the deceased ordered her dog to bite him and he kicked it away. *See Moreno*, 858 S.W.2d at 465; *Long*, 823 S.W.2d at 273.

When determining whether the trial court erred in admitting the relevant photographs into evidence, our review is limited to determining whether the probative value of the photos is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence. Rule 403; *Long v. State*, 823 S.W.2d at 271, citing *Montgomery v.*

State, 810 S.W.2d 372, 389 (Tex.Crim.App. 1991) (Opinion on Rehearing).

A court may consider many factors in determining whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice. These factors include: the number of exhibits offered, their gruesomeness, their detail, their size, whether they are in color or black and white, whether they are close-up, and whether the body depicted is clothed or naked. *Long*, 823 S.W.2d at 272. A court, however, should not be limited by this list. The availability of other means of proof and the circumstances unique to each individual case should also be considered. *Id.*

The portrait of the deceased was an 8" by 10" color photograph and was used to prove the identity of the deceased. We do not conclude that it's probative value was substantially outweighed by its prejudicial effect.

In reviewing the four autopsy photographs, we note initially that three were color and 3½" by 5" in size, and the remaining photograph was 8" by 10" and was black and white. Appellant does not explain why he believes the photographs were inflammatory and prejudicial. He does point out that they were cumulative. We fail, however, to conclude that the photos were cumulative because no other pictures of the wounds were offered into evidence. The photos were used at trial to show the wound causing death and the bruises to the deceased's side, back, and face. Although the pictures were gruesome and detailed, they were not enhanced in any way and portrayed no more than the gruesomeness of the injuries inflicted. *See Narvaiz*, 840 S.W.2d at 429. After

reviewing all of the objected-to photographs, we are not persuaded that the danger of unfair prejudice substantially outweighed their probative value. Therefore, we hold that the trial court did not err in admitting the exhibits.

Appellant also complains that the introduction of the complained-of exhibits presented evidence of victim impact. He cites, as direct authority, *Booth v. Maryland*, 482 U.S. 496 (1987).[37]

At appellant's trial, the witnesses identifying the deceased and the dog were questioned about their relationship with the deceased and the animal and the identification of both. There was no testimony as to opinions of appellant, the alleged crime, or the appropriate sentence. Thus, the testimony concerning the exhibits was not the type of evidence contemplated by *Booth v. Maryland*. The trial court did not err in admitting the exhibits. Points of error 72 through 74 are overruled.

In point of error 103, appellant argues that the trial court erred in failing to explain the meaning of "acquit" in the jury charge. Appellant contends that, without a definition, the jury may have believed that they would be

[37] The Supreme Court, in *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), held that the Eighth Amendment does not forbid victim impact testimony. *Payne* limits *Booth* to that part precluding evidence of a victim's family members' characterizations and opinions about the crime, the defendant and the appropriate sentence.

declaring appellant "completely innocent" if they acquitted him.[38]

As we stated previously with regards to the terms "rational," "reasonable," and "understanding," we do not believe that the term "acquit" has become so technical that it is a legal term of art requiring the trial court to define it. It is not necessary to define terms that are simple and used in their ordinary meaning; jurors are presumed to know such common meaning and terms. *Russell*, 665 S.W.2d at 780. The jury was entitled to give the term its common and ordinary meaning. Appellant's point of error 103 is overruled.

In points of error 104 through 106, appellant argues that the trial court erred in failing to include the statutory definition of "elements of the offense" in the jury charge. *See* Tex. Penal Code § 1.07(13). At trial, however, appellant asked the trial court to define "elements of the offense" as "both the required mental state, 'intentionally' and the prohibited acts." Because appellant's trial objection does not comport with his argument on appeal, any error is waived. Tex. R. App. Proc. 52(a); *Barnes*, 876 S.W.2d at 325; *Johnson*, 803 S.W.2d at 293.

Further, we note that the trial court did instruct the jury as to the applicable law. When a refused charge is substantially the same or is adequately covered by the

[38] The first time "acquit" is used, the jury charge states:

> If you do not so find beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will acquit the defendant of the offense of capital murder, and consider whether he is guilty of the lesser offense of murder.

charge given, there is no harm in the failure to give the refused charge. *Hawkins v. State*, 660 S.W.2d 65, 81-82 (Tex.Crim.App. 1983). In its charge to the jury, the court set out each element of the offense including the required culpable mental state. The instruction also contained the definition of "intentionally" and stated that the jury would have to find "beyond a reasonable doubt" that appellant intentionally committed the crime. We conclude the charge given adequately covered the charge refused. Points of error 104 through 106 are overruled.

In points of error 107 through 110, appellant contends that the trial court erred in refusing to instruct the jury to consider appellant's mental condition in making its determination of whether he had the specific intent to kill.[39] He argues that the statutory definition of

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[39] Appellant's requested instruction number three admonished the jury:

> If you find from the evidence that at the time the alleged offense was committed, the defendant had substantially reduced mental capacity, whether caused by mental illness, mental retardation, or other mental defect, or other cause, you must consider what effect, if any, this diminished mental capacity had on the defendant's ability to form the "intentional" mental state which is an element of the crime of capital murder.
>
> Thus, if you find that the defendant's mental capacity was diminished to the extent that you have a reasonable doubt whether he did intentionally commit the acts constituting capital murder, even if you find beyond a reasonable doubt that he performed the acts, you are to find the defendant not guilty of capital murder, and consider whether or not he is guilty of a lesser offense.

"intentional" given to the jury presupposes that the accused is able to connect his acts with their results. *See* Tex. Penal Code § 6.03(a). Therefore, he asserts, the jury was afforded no opportunity to give effect to the evidence of his poor reasoning ability and may have shifted the burden of proof to the defense on the issue of intent. Appellant also complains that the charge failed to emphasize to the jury that they should take all evidence, especially any abnormal physical or mental conditions, into account when deciding the issue of intent.

The trial court instructed the jury as follows on the issue of intent to kill and the burden of proof:

> A person commits capital murder when such person intentionally causes the death of another

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Appellant's requested instruction number four read:

> You are instructed that when a person is charged with an offense which requires that he act intentionally . . . you must take all of the evidence into consideration, and determine therefrom, if, at the time when the offense was allegedly committed, the person accused was suffering from some abnormal mental or physical condition, however caused, which prevented him from forming the intent essential to constitute the offense with which he is charged.
>
> If from all the evidence you have a reasonable doubt whether the defendant was capable of forming the intent necessary to constitute the offense of capital murder, you must give the defendant the benefit of the doubt, and find that he did not have such intent. In such event you are to say by your verdict that the defendant is not guilty of capital murder . . .

while such person is in the course of committing or attempting to commit the offense of aggravated rape. . . .

A person acts "intentionally," or with intent, with respect to the nature of his conduct or with respect to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result. . . .

Unless you find from the evidence beyond a reasonable doubt that the defendant, on said occasion, specifically intended to kill the said Pamela Carpenter when he stabbed her, if he did stab her, you cannot convict him of the offense of capital murder.

The burden of proof in all criminal cases rests upon the State throughout the trial, and never shifts to the defendant.

All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt.

Article 36.14 states that a jury charge should set forth the applicable law without expressing an opinion on the evidence, summing up testimony, or discussing facts or using jury argument to arouse the sympathy or excite the passions of the jury. Further, this Court has held that when the charge accurately describes the applicable law, a requested instruction specifically emphasizing evidence of mental retardation is an improper comment on the weight of the evidence. *Bell*, 582 S.W.2d at 812.

Here, the trial court instructed the jury to make findings as to appellant's intent to kill and other elements of

the offense from the evidence. The trial court also properly submitted the statutory definition of "intentional." *See* Tex. Penal Code § 6.03(a). Appellant presented extensive evidence on his mental handicap at trial and emphasized it during jury argument. We see no reason to conclude that the jury did not consider this evidence in making its findings. A specific instruction calling attention to the evidence on appellant's impaired mental abilities was unnecessary, and might have inappropriately vested this evidence with a disproportionate legal significance in the eyes of the jury. *See Bell*, 582 S.W.2d at 812.[40]

Appellant complains further that the trial court failed to narrow the range of offenders subject to the death penalty in the charge to the jury. He specifically states that persons with a substantial mental disease or defect may be unaware that their conduct is "wrong." Therefore, the trial court should have instructed the jury that these mentally-impaired persons could not be convicted of capital murder. We address this issue in point of error 132, *infra*. The trial court did not err in failing to submit this

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[40] Appellant's reliance on *Francis v. Franklin*, 471 U.S. 307 (1985), is misplaced. In that case, the Court struck down a jury charge which expressly stated a rebuttable presumption that "(a] person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts." *Id.*, at 311. The Court found that a reasonable juror might have viewed this instruction as mandatory. *Id.* However, the charge given by the trial court in this case set up no such explicit presumption which could have misled the jury. Appellant also reiterates the argument that he was entitled to an affirmative submission of a defensive theory under the rule stated in *Hill v. State*, 585 S.W.2d 713 (Tex.Crim.App. 1978). We have already addressed this issue.

instruction. Appellant's points of error 107 through 110 are overruled.

In his 111th through 114th points of error, appellant contends that the trial court erred in denying his requested jury instructions on "reasonable doubt" in both the guilt/innocence and punishment phases of trial. He argues that because his requested instructions are similar to the one required in *Geesa v. State*, 820 S.W.2d 154 (Tex.Crim.App. 1991), special circumstances apply to his case which justify the retroactive application of our holding in *Geesa*. During both phases of trial, appellant requested the following instruction:

> A reasonable doubt is based upon reason and common sense, and not the mere possibility of guilt. A reasonable doubt is the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt, therefore, must be proof of such convincing character that a reasonable person would not hesitate to act and rely on it.

We have already held that it is not error for a trial court to refuse to define reasonable doubt during the guilt/innocence and punishment phases of a pre-*Geesa* case. *Barnes v. State*, 876 S.W.2d at 328.

Appellant further contends that the trial court erred in failing to give an instruction comparing the reasonable doubt standard to the standards of preponderance of the evidence and clear and convincing proof. We do not perceive this argument as novel. Requiring the trial court to compare the different standards of proof is merely another method of defining the term "reasonable doubt."

We have already held that was not required. Points of error 111 through 114 are overruled.

In point of error 114a, appellant claims that the trial court erred in not including an instruction in the charge on the lesser included offense of voluntary manslaughter. Appellant specifically argues that the lesser-included offense of voluntary manslaughter was raised because the jury may have disbelieved his two confessions, they may have believed the victim was not raped, and his diminished capacity for reasoning rendered him incapable of cool reflection.

In determining whether appellant is entitled to a charge on a lesser-included offense, we must consider all of the evidence introduced at trial, whether produced by the State or the defendant. *Goodwin v. State*, 799 S.W.2d 719, 740 (Tex.Crim.App. 1990); *Dowden v. State*, 758 S.W.2d 264, 269 (Tex.Crim.App. 1988). This Court uses a two-pronged test in its review. *Goodwin*, 799 S.W.2d at 740-741; *Dowden*, 758 S.W.2d at 268. First, the lesser-included offense must be included within the proof necessary to establish the offense charged. Second, there must be some evidence in the record that if the defendant is guilty, he is guilty only of the lesser-included offense. The credibility of the evidence and whether it conflicts with other evidence or is controverted may not be considered in determining whether an instruction on a lesser included offense should be given. *Rousseau v. State*, 855

S.W.2d 666, 672-73 (Tex.Crim.App. 1993); *Marras v. State*, 741 S.W.2d 395, 405 (Tex.Crim.App. 1987).[41]

Voluntary manslaughter is a lesser-included offense of capital murder. *Nobles v. State*, 843 S.W.2d 503, 511 (Tex.Crim.App. 1992). Therefore, appellant has met the first prong of the test. However, he fails to meet the second prong. A charge on voluntary manslaughter should be given when evidence is presented that the defendant acted "under the immediate influence of sudden passion arising from an adequate cause." Tex. Penal Code § 19.04(a); *Vuong v. State*, 830 S.W.2d 929, 938 (Tex.Crim.App. 1992). "Sudden passion" is defined as "passion directly caused by and arising out of provocation by the individual killed or another acting with the person killed which passion arises at the time of the offense and is not solely the result of former provocation." Tex. Penal Code § 19.04(b). "Adequate cause" is "cause that would commonly produce a degree of anger, rage, resentment, or terror in a person of ordinary temper, sufficient to render the mind incapable of cool reflection." Tex. Penal Code § 19.04(c).

The following evidence was adduced at trial: Appellant's confessions state that he became acquainted with the victim when he was assisting another man with a delivery of some appliances to her home about three weeks prior to October 25, 1979. On the morning of October 25th, he decided he would go to the victim's house and rape her. Appellant knew that if he went over

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[41] Overruled on other grounds by *Garrett v. State*, 851 S.W.2d 853, 860 (Tex.Crim.App. 1993).

to the victim's home and raped her, he would have to kill her because she would tell the police. After arriving at the victim's home, he forced his way in and threatened her with a pocket knife. After a struggle during which appellant hit the victim, knocked her to the floor, and shoved her into the stove, the victim managed to grab a pair of scissors and stab appellant in the back.

Appellant knocked the scissors out of the victim's hand and dragged her into the bedroom. The victim refused to get undressed so appellant kicked her with his boots and "stomped" her once. The victim eventually complied and pulled her underpants down by her knees. Appellant unzipped his pants and attempted to get on top of her, but the victim got up. Appellant pushed her back down to the floor, hit her two or three times in the chest, and threatened to kill her if she would not "make love" to him. Appellant then had intercourse with the victim for about thirty minutes.

After sexually assaulting the victim, appellant got up and retrieved the scissors. He then came back and sat on the victim's stomach. Appellant told her that he hated to kill her but he thought that she would squeal on him. He then plunged the scissors into her chest.

The defense and the State both presented evidence concerning appellant's mental status. Appellant had I.Q. scores ranging from the forties to the seventies. No evidence was presented concerning how appellant's mental status would affect his knowledge of right from wrong or how he would react to a victim's retaliation.

This Court has held that "[w]hen a defendant begins a violent criminal episode, his or her subsequent acts of

violence cannot constitute an 'adequate cause' so as to warrant an instruction on voluntary manslaughter." *Vuong*, 830 S.W.2d at 939. Thus, the trial court did not err.

Appellant further argues that because there was no corroborating evidence of rape or attempted rape,[42] he should have gotten a voluntary manslaughter charge. We disagree. The fact that the rape may not have been corroborated would merely require the trial court to submit an instruction on the lesser-included offense of murder. This was done. The trial court did not err in denying appellant's requested charge on voluntary manslaughter. Point of error 114a is overruled.

JURY ARGUMENT

In points of error 33 and 34, appellant contends that the prosecution made improper jury arguments. In point of error 33, appellant argues that the prosecutor engaged in improper argument by interjecting his personal opinion regarding appellant's guilt. He further asserts that the prosecutor's statements suggested that the prosecutor knew of "additional, undisclosed information obtained from the investigatory phase." The State made the following argument at trial:

> If you think he is not guilty, then, you can go back there and write on that line, not guilty. I, never in my life have I stood before a jury and said that, but, I feel that confident. I feel that strong about this case, and I am biased, I will

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[42] An emergency room nurse did testify that she observed a substance that she believed to be semen in the victim's vaginal area.

> tell you that right now, I am biased. I was in Livingston on October 25, 1979. I am very biased, and I want you to know it. I am an advocate, I represent the State of Texas in this case, and I came into this case believing that he was guilty. I came into this case with one thought in mind, and that is to present evidence to you so that you would be as convinced as I am of the guilt of this –
>
> * * *
>
> DEFENSE COUNSEL: Objection to the Prosecutor expressing his personal convictions about the testimony. That is improper.
>
> THE COURT: The objection is overruled. You are not to express your personal opinions, though, Mr. Price.

The prosecutor made his statement while discussing the standard of proof the jury would use during its deliberations. He stated that he was biased in his belief that his case was strong, but this belief was apparently based on the evidence he brought forth in trial. A prosecutor "may argue his opinions concerning issues in the case so long as the opinions are based on the evidence in the record and not constituting unsworn testimony." *Felder v. State*, 848 S.W.2d 85, 95 (Tex.Crim.App. 1992). Such was the case here. No error occurred. Point of error 33 is overruled.

In point of error 34, appellant challenges the following argument made at the guilt/innocence stage:

> Would Pam Carpenter [the victim] lie to you about [the rape]? Did she lie on October 25, 1979, as she was dying? I don't think so.

Citing *Menefee v. State*, 614 S.W.2d 167 (Tex.Crim.App. 1981), appellant contends that the foregoing argument constituted an improper attempt by the prosecutor to inject his personal opinion of the victim's credibility. The complained-of argument in *Menefee* was as follows:

> And Virse [a witness], I don't believe I have ever seen anybody that I thought was more honest than she is.

This Court concluded that the trial court reversibly erred in overruling defense counsel's objections to the State's argument. *Id.* at 168.

The argument in the instant case, however, did not constitute an attempt to personally vouch for the victim's honesty and credibility. Here, the victim was in the process of dying. The prosecutor's argument merely pointed out the inherent reliability of dying declarations. As such, the argument amounted to a reasonable deduction from the evidence and, therefore, fell into one of the permissible categories of jury argument. *Felder*, 848 S.W.2d at 94-95. Point of error 34 is overruled.

PSYCHIATRIC EVIDENCE

In points of error twelve through seventeen, appellant contends that the trial court erred in admitting the testimony of three expert witnesses based on "involuntary psychiatric examinations." He asserts these examinations violated his Fifth and Sixth Amendment rights under *Estelle v. Smith*, 451 U.S. 454 (1981).

Before appellant's July 1990 trial, defense counsel requested a hearing to determine appellant's competency to stand trial. In addition, defense counsel filed a notice of intent to raise the issue of insanity.[43] The State then asked the trial court to appoint a disinterested psychiatrist to examine appellant. The trial court granted the State's request and appointed Drs. Fred Fason and Walter Quijano to examine appellant for competency. A jury later found appellant competent to stand trial.

At trial, the State presented three psychiatric witnesses. Dr. Fason testified at guilt/innocence in rebuttal concerning appellant's mental retardation. Drs. Quijano and Stanton Samenow testified at punishment concerning future dangerousness. Samenow did not examine appellant. Appellant also complains about a 1977 competency examination performed by Dr. Felix Peebles for a previous aggravated rape conviction that was used by Fason, Quijano, and Samenow in reaching their conclusions.

Applicable Law

In *Estelle v. Smith*, the Court held that, because the defendant was not informed that what he said during the competency examination could be used against him at the punishment phase of his capital trial on the issue of future dangerousness, his Fifth Amendment right against compelled self-incrimination was violated. The Court left open the issue of the admissibility of such compelled testimony in response to a defendant's assertion of the

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[43] Appellant later withdrew the notice on May 22, 1990. The competency trial took place May 7-16, 1990.

insanity defense or to a defendant's use of psychiatric evidence in his own behalf on the issue of future dangerousness. The Court further held that Smith's Sixth Amendment right to counsel was violated because, even if Smith's counsel had been informed about the examination, his counsel was not aware that the examination would include an inquiry into Smith's future dangerousness. 451 U.S. at 471.

In *Buchanan v. Kentucky*, 483 U.S. 402 (1987), the Supreme Court addressed the issue left open in Smith concerning the State's use of psychiatric testimony for *rebuttal* purposes when the defendant has initiated the use of psychiatric evidence. In *Buchanan*, defense counsel joined with the prosecutor in a motion for involuntary hospitalization of the defendant for treatment of mental illness. At trial, the defendant attempted to establish the affirmative defense of "extreme emotional disturbance," relying on psychological reports and letters read into the record by a social worker. *Id.* at 408-09. In response, the prosecutor introduced part of a report made by a doctor concerning his observations about the defendant's mental state when the defendant was involuntarily hospitalized. Buchanan objected that his Fifth and Sixth Amendment rights under *Smith* were being violated because his counsel had not been present during the exam and he had not been informed that the results could be used against him at trial.

Relying on language in *Smith*, the Court stated:

> [I]f a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution.

Id. at 422-423 (citations omitted). The Court noted this report did not describe any statements made by the defendant dealing with the offenses for which he had been charged. The Court concluded that use of such a report for "this limited rebuttal purpose" was not a Fifth Amendment violation. *Id.* at 424.

Next, the Court held Buchanan's Sixth Amendment rights were not violated. The proper concern of the Sixth Amendment is whether the defendant had effective consultation with counsel. Effective consultation must be based on counsel being informed about the scope and nature of the proceeding. *Id.* at 424. The Court held on the facts of *Buchanan*:

> There is no question that [Buchanan's] counsel had this information. To be sure, the effectiveness of the consultation also would depend on counsel's awareness of the possible uses to which petitioner's statements in the proceeding could be put. Given our decision in *Smith*, however, counsel was certainly on notice that if, as appears to be the case, he intended to put on a "mental status" defense for [Buchanan], he would have to anticipate the use of psychological evidence by the prosecution in rebuttal.

Id. at 424-25.

Discussion

During the guilt/innocence phase of the instant case, Dr. Fason testified in rebuttal to appellant's mental-status evidence. Concerning his examination of appellant, Fason discussed his general observations of appellant such as whether appellant was able to control himself during the interview and whether he was coherent. The only testimonial evidence attributed to appellant was whether he could identify his defense counsel present at the interview. No other testimonial evidence was discussed. *Cf. Smith*, 451 U.S. at 464 and 465 n. 9. Fason did state that he used his interview with appellant in reaching his conclusions regarding appellant's I.Q. tests and mental retardation.

As in *Buchanan*, appellant presented mental health evidence by having a third-party[44] read into the record various reports concerning appellant's I.Q. and mental retardation. While the reports did not state that appellant was insane or incompetent at the time of the offense, their information regarding appellant's mental status was part of the foundation upon which appellant based his defense. Further, language in *Smith* and *Buchanan* indicates that if a defendant introduces psychiatric evidence in some form, the State may also introduce psychiatric evidence in some form. *Smith*, 451 U.S. at 465-466; *Buchanan*, 483 U.S. at 422. Therefore, appellant's Fifth Amendment privilege was not violated at the guilt/innocence phase by the State's use, in rebuttal, of testimony

[44] A member of the defense team.

by Fason concerning appellant's I.Q. and mental retardation.[45]

Further, appellant's counsel was on notice that if he intended to put on a "mental status" defense, he would have to anticipate the use of psychological evidence by the prosecution in rebuttal. *Buchanan*, 483 U.S. at 424-25.[46] The Sixth Amendment danger addressed by the Supreme Court is failure to notify counsel of a psychiatric examination concerning future dangerousness. *Smith*, 451 U.S. at 471; *Satterwhite v. Texas*, 486 U.S. 249, 254 (1988); *Powell v. Texas*, 492 U.S. 680, 681 (1989). Appellant was not examined for future dangerousness; nor did Fason testify

[45] Appellant also specifically complains that Fason expressed an opinion that appellant had an "antisocial personality disorder." Despite appellant's assertions, we view the testimony as rebuttal to appellant's evidence. First, Fason describes how the disorder could affect the accuracy of an I.Q. test. Second, when he was asked, "Do you have a diagnosis with respect to any other aspects of his mental status in *1979*?" Fason responded that appellant had the disorder. Because Fason did not examine appellant until 1990, his opinion regarding the antisocial disorder had to be based on records and reports prior to the instant offense. We also note that when Fason was specifically asked whether he noted any disorder during his interview with appellant, he replied that nothing in the interview stood out to him as being relevant to the question.

[46] At a hearing on pretrial motions, the trial court stated that Fason's and Quijano's examinations would not be used at trial *unless* the defense put on psychiatric evidence; at that point the "evidence might be admissible." We also note appellant's counsel was present at both the Fason and Quijano examinations and would not allow either doctor to read appellant his statutory rights.

about it. Therefore, no error occurred. Points of error sixteen and seventeen are overruled.

At punishment, Dr. Quijano testified as to appellant's future dangerousness. However, Quijano did not base his opinion on his examination of appellant:

> Q [By State] Dr. Quijano, the last question that I asked you pertained to the likelihood of this Defendant committing a criminal act of violence in the future, and you testified, to the various elements and basis that you arrived at that opinion, and I want to specifically ask you, did you, in arriving at that opinion, rely upon your personal interview with the Defendant, back in May, to reach that opinion or conclusion?
>
> A No, I did not.

Because Quijano did not use his examination of appellant to reach his conclusion, no error occurred.[47] *See Hernandez v. State*, 805 S.W.2d409, 412 (Tex.Crim.App. 1990). Points of error twelve and thirteen are overruled.

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[47] Appellant specifically complains that Quijano also expressed an opinion that appellant had an "antisocial personality disorder" and that the opinion must have come from his interview of appellant. Appellant mischaracterizes the source of the diagnosis. First, we note that Quijano stated that he did not observe any type of mental illness in appellant during the interview. He further testified that he had "not definitely diagnosed him, I am going by previous evaluation." Quijano did not use his examination of appellant to reach this opinion. Quijano viewed extensive records dealing with appellant's mental and criminal history. More than one of these reports state that appellant had an antisocial personality disorder.

As for the 1977 examination by Dr. Peebles, appellant contends first that it was involuntary. However, Clayton Malone, appellant's former defense counsel for the unrelated 1977 rape case, testified that he requested the examination himself.[48] Therefore, no Sixth Amendment violation occurred. Further, no expert witness referred to any testimonial statements by appellant in the report.

Next, appellant maintains that the Peebles' exam violated his Fifth Amendment rights. He asserts that Samenow's opinion of future dangerousness was based on the Peebles' examination. Samenow never made such a statement. He merely stated that the Peebles' exam was one of many documents he reviewed in coming to his conclusion. Appellant also asserts that Quijano and Fason relied on the Peebles' exam. However, Quijano never stated he used the exam and, even though he mentioned he reviewed the exam, Fason did not testify as to future dangerousness.

We hold *Estelle* is inapplicable to the facts of this case. The Peebles' exam was conducted two years prior to the offense at issue here and thirteen years prior to the capital murder trial which is the subject of this appeal.[49] As we stated in *Nelson v. State*:

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[48] Malone testified at an evidentiary hearing concerning the admission of evidence of the prior rape conviction during the punishment phase.

[49] It should be remembered that the trial which is the subject of this appeal is actually the second trial of appellant since his first case was appealed to and reversed by the Supreme Court. *See Penry v. Lynaugh, supra.*

> The Fifth Amendment is not implicated because, at the time appellant made his statements, he was not confronted with someone who was essentially an agent for the State whose function was to gather evidence that might be used against him in connection with the crime for which he was incarcerated.

848 S.W.2d 126, 135 (Tex.Crim.App. 1992) (statements made to psychiatrist, etc., while incarcerated for a previous offense). The trial court did not err. Points of error fourteen and fifteen are overruled.

Finally, appellant asserts that the State improperly used and relied on each of the experts' testimony during closing argument. He also specifically states that the prosecutor argued at punishment that Fason testified as to future dangerousness. Because appellant failed to object to any of these arguments when made, he has preserved nothing for our review. Tex. R. App. Proc. 52(a); *Johnson*, 803 S.W.2d at 291.

PUNISHMENT PHASE

In his 65th point of error, appellant avers that the trial court erred in denying appellant's request to make an opening statement at the punishment phase. Appellant relies on Article 36.01 as authority.

Article 36.01 sets out the order of proceedings at the guilt/innocence phase of trial. The failure to allow a defendant to make an opening statement under the provisions of the article constitutes reversible error. *Farrar v.*

State, 784 S.W.2d 54, 56 (Tex.App. – Dallas 1989). However, Article 36.01 does not apply to the punishment phase of trial.

For capital cases, Article 37.071 requires the trial court to conduct a separate sentencing proceeding before the jury to determine whether the defendant shall be sentenced to death or life imprisonment. The article is silent as to whether the State or the defendant has a right to an opening statement.

Even if we were to follow appellant's argument that Article 36.01 is applicable at the punishment phase, the trial court still would not have erred in denying his request. Article 36.01 allows a defendant to make an opening statement prior to presentation of the State's case only when the State first makes one. *Moore v. State*, 868 S.W.2d 787, 790-91 (Tex.Crim.App. 1993). The State did not request or make an opening statement during punishment. Point of error 65 is overruled.

In points of error eighteen through 25, appellant argues that the trial court erred in admitting State's exhibits 91 and 96 through 102. Appellant alleges these exhibits contain documents which are inadmissible because they (1) constitute hearsay, (2) are irrelevant, (3) have prejudicial character which outweighs their probative value, (4) violate his Sixth Amendment right to confront witnesses, and (5) violate his Fifth and Sixth Amendment rights with respect to custodial examinations of appellant. We find no reversible error.

We first note that appellant made no objections to exhibit 98[50] at trial. Therefore, nothing is preserved for our review. Tex. R. App. Proc. 52(a); *Johnson*, 803 S.W.2d at 291. Point of error 21 is overruled.

Further, appellant has provided no argument or authority regarding his relevancy, prejudice,[51] and custodial examination claims. Therefore, we consider these issues inadequately briefed and as presenting nothing for our review. Tex. R. App. Proc. 74(f); *Robinson*, 851 S.W.2d at 222 n.4.

Exhibits 91, 96, 97, 99, 100, 101, and 102 each include records from a particular mental-health facility, school, or other institution with which appellant had been involved.[52] These records contain appellant's various I.Q. scores, mental health background, and evaluations. Appellant also cites specific portions of exhibits 91, 96, and 97 pertaining to medical records documenting alleged past homosexual and arson-related activities. The prosecutor referred to the disputed exhibits, in some cases before they were admitted into evidence, in his cross-examination of defense expert Dr. Randall Price and

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[50] Exhibit 98 is an educational progress report from the Mexia State School. The report notes that appellant had a disciplinary problem.

[51] Appellant does cite us to Rule 403. However, he fails to explain its applicability to the case at hand. We decline to make appellant's arguments for him.

[52] The University of Texas Medical Branch-Galveston, Texas Department of Corrections, Austin State Hospital, Rusk State Hospital, Mexia State School, Goose Creek Independent School District, Polk County MHMR, and the Texas Rehabilitation Commission.

others. The documents were offered during the cross-examination of Price.

Appellant first complains that the foregoing exhibits contain hearsay and hearsay within hearsay. Aside from those stated above, appellant has not pointed out which portions of the exhibits contain hearsay. After a review of each exhibit, we conclude that any objectionable hearsay seems to involve appellant's disciplinary problems as a youth, his activities concerning arson, his previous rape conviction, and his alleged homosexuality. We agree with appellant that these portions of the exhibits constitute hearsay. *See* Rule 801. However, any error in the admission of the evidence was harmless, because the evidence was also presented to the jury through other means. *See* Tex. R. App. Proc. 52(a).

As noted before, exhibit 98 was admitted without objection. Therefore, any other reference regarding appellant's disciplinary problems while in school were properly admitted into evidence. Evidence of appellant's arson charge came into evidence through exhibit 95-C[53] and the testimony of his aunt, Patsy Fuller Ross. Proof of appellant's previous rape conviction came in through his "pen packet" and plea papers for the extraneous offense,[54] the testimony of Nell Lowe, the District Clerk of Polk County, and the testimony of the rape victim. Finally, evidence of appellant's homosexuality also came

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[53] No objection was made to exhibit 95-c on hearsay grounds.

[54] State's exhibits 60, 88, 89, and 90.

into evidence through the unobjected-to testimony of his sister, Trudy Ross.

We further note that evidence regarding appellant's homosexuality and arson-related activities was also properly addressed during the State's cross-examination of Dr. Price. *See* Rules 703 and 705. Dr. Price testified that he reviewed two of the eight specific documents cited by appellant in his brief: a letter dated August 15, 1973, from Dr. Exter Bell to Mr. William Leikam, which discusses alleged homosexual and fire-setting activities by appellant, and an admission note to the Austin State Hospital Adolescent Center dated September 17, 1973, discussing past arson charges and appellant's father's reaction to appellant's homosexual activities at the Mexia School.

Rules 703 and 705 allow an expert witness to rely on inadmissible evidence under limited circumstances when testifying. *See Joiner v. State*, 825 S.W.2d 701, 707 (Tex.Crim.App. 1992). This Court has said that during cross-examination of an expert witness, it is improper to disclose the results of studies by asking leading questions when it has not been established that the expert relied on those studies in his testimony. *Ramirez v. State*, 815 S.W.2d 636, 651 (Tex.Crim.App. 1991). However, Dr. Price testified that he did review these two documents at the request of defense counsel. Because Dr. Price relied on evidence of appellant's homosexual and arson-related acts in his testimony, the State's questions about these topics during cross-examination were not improper.

Appellant next maintains that the admission of these documents violated his rights under the confrontation clause of the Sixth Amendment because the documents

contain generalized statements from sources of unknown reliability. However, out-of-court statements, even by unidentified informants, are admissible for sentencing purposes and do not violate the confrontation clause, where there is additional corroboration. *U.S. v. Young*, 981 F.2d 180, 187 (5th Cir. 1992), *cert. denied*, *Allman v. U.S.*, 113 S.Ct. 2454 (1993) and *Crow v. U.S.*, 113 S.Ct. 2983 (1993); *U.S. v. Rodriguez*, 897 F.2d 1324, 1328 (5th Cir. 1990), *cert. denied*, 498 U.S. 857 (1990). The disputed statements from appellant's medical records were corroborated by statements made by in-court witnesses available for cross-examination and by other records submitted by appellant.

In addition, the rights of confrontation and cross-examination are not absolute. Cross-examination is not necessary where the evidence bears indicia of reliability sufficient to ensure the integrity of the fact-finding process. *Porter v. State*, 578 S.W.2d 742, 745 (Tex.Crim.App. 1979). Most of the disputed statements were made many years ago by appellant's family, doctors, and nurses in the context of appellant's medical treatment, and not in the context of this criminal proceeding. Thus, the circumstances surrounding these statements show indicia of reliability, since the declarants had no obvious motive for bias against appellant and in many cases described the events while they were fresh on their minds. Points of error eighteen through 25 are overruled.

In points of error 27 and 28, appellant contends that the trial court erred in excluding two exhibits offered in mitigation during the punishment phase. The trial court excluded these exhibits containing the mental health

records of appellant's mother because they were irrelevant. Appellant argues the records were relevant because they contained evidence that appellant's mother suffered from severe mental illness, thus bolstering the testimony of his mitigation witnesses that he had been abused by her.

The mental health records in question described the hospitalization of appellant's mother for post-partum psychosis on two occasions. The records did not discuss whether appellant's mother abused any of her children, or even whether her mental condition made it likely that she would abuse her children. There was no evidence that her psychological problems would have led to child abuse. Because appellant explicitly offered this testimony for the purpose of reinforcing his evidence that his mother abused him, it was not relevant and was, therefore, inadmissible. *See* Rules 401 and 402. Points of error 27 and 28 are overruled.[55]

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[55] Appellant cites two inapplicable cases in support of his theory that the records should have been admitted. In *Gribble v. State*, we held that the defendant's mother's mental health records were admissible where defendant was attempting to show that his childhood was unstable because his mother was hospitalized for mental problems for years and, as a result, the children were sent to live with various relatives. 808 S.W.2d 65, 75-76 (Tex.Crim.App. 1990). The records at issue also explained how the defendant's mother's mental disorder resulted in her sexual abuse of defendant. *Id.* Appellant's mother's records in the instant case do not link child abuse with her condition or even mention actual or potential child abuse. The second case cited by appellant is non-binding on this Court and involves facts which are completely unrelated to appellant's case. *See Buttrum v. Black*, 721 F.Supp. 1268, 1314-1315 (N.D. Ga. 1989).

In point of error 77, appellant maintains that the trial court erred in allowing Dr. Stanton Samenow to testify as an expert on mental retardation. Appellant argues that Samenow was not qualified to give his expert opinion on the subject. Appellant does not question the doctor's expertise on any other subject about which he testified.

The special knowledge which qualifies a witness to give an expert opinion may be derived from specialized education, practical experience, a study of technical works, or a varying combination of these things. Rule 702; *Holloway v. State*, 613 S.W.2d 497, 501 (Tex.Crim.App. 1981). Whether a witness offered as an expert possesses the required qualifications is a question which rests largely in the trial court's discretion, and the decision to admit or exclude the testimony will not be disturbed absent a clear abuse of discretion. *Duckett v. State*, 797 S.W.2d 906, 910 (Tex.Crim.App. 1990). The party proffering the expert witness bears the burden of showing that the witness is qualified on the specific matter in question. Rule 702.

Appellant objected to Samenow's testimony because he had not been qualified as being an expert on mental retardation. We disagree. The State asked various questions regarding Samenow's experience and training in the areas of clinical psychology. Samenow testified to his extensive educational background and professional memberships, and listed several publications he authored dealing with criminal psychology. He further testified that he had been teaching at professional seminars on criminal behavior for various groups, including mental health professionals, since 1977. He conducted a study in forensic psychiatry for seventeen years at St. Elizabeth's

Hospital, which was run by the National Institute for Mental Health.

After the State asked Samenow if he had reviewed appellant's various IQ tests taken over the years and how they pertained to his varying degrees of assessed mental retardation, appellant objected that the State had not laid a foundation for Samenow's expertise on mental retardation. The trial court overruled his objection. Samenow then testified about his familiarity with I.Q. tests, their relationship to determining mental retardation, and the differences between the various tests that are given.

The trial court did not abuse its discretion in allowing Dr. Samenow to testify about the relationship between appellant's I.Q. tests and his mental retardation. Point of error 77 is overruled.

In a similar argument, in point of error 26, appellant contends that the State elicited an inadmissible lay opinion which was outside the scope of the defense witness' expertise. Specifically, appellant called Dr. Randolph Price to testify as a defense expert regarding neuropsychology, organic brain damage, mental retardation, and the effects of malingering on relevant psychological tests. On cross-examination, the State questioned Price about appellant's future dangerousness. The State contends that appellant failed to preserve any error. We agree.

The following occurred during cross-examination:

> THE PROSECUTOR: Based on your examination of those records that were furnished to you, as well as those others that you gave Dr. Mount, if you saw any of them, and based on all of your

> training, and experience and all of your qualifications, that you told the jury about yesterday, in your opinion, Doctor, is [appellant] a dangerous individual?
>
> DEFENSE COUNSEL: objection, Your Honor.
>
> * * *
>
> No basis for asking this witness about that, that is not the subject of his testimony.
>
> THE COURT: Overrule the objection.
>
> DR. PRICE: If he was in the free world, I would consider him dangerous.

Appellant's trial objection does not comport with the issue raised on appeal. Therefore, he has preserved nothing for our review. *Barnes*, 786 S.W.2d at 325; *Johnson*, 803 S.W.2d at 293. We do note that appellant later made the proper objection. However, Price had already stated his opinion. To be timely, an objection must be raised at the earliest opportunity or as soon as the ground of objection becomes apparent. Tex. R. App. Proc. 52(a); *Barnes*, 876 S.W.2d at 325. Appellant's 26th point of error is overruled.

In points of error 29 and 31, appellant contends that the trial court erred in not instructing the jury that, and in not allowing in evidence that, if not given the death penalty he would spend the remainder of his life in jail.

At punishment, appellant attempted to have admitted the following "waiver of parole":

> July 16, 1990
>
> I, Johnny Penry, am putting my name on this paper to show that I want to give up my

> right to parole for the rest of my life. I understand that I cannot change my mind later, and that I will have to serve life in prison, without parole.
>
> /s/
> Johnny Paul Penry

The trial court denied appellant's request. On appeal, appellant cites no authority or argument as to why this document would be binding. He instead claims that whether the document is binding is irrelevant,[56] but that the issue of waiver is nevertheless relevant to the jury's consideration of future dangerousness. He notes that if the document had been admitted into evidence, it would have "opened the door to other evidence on the realistic likelihood of Penry's parole, perhaps including expert witnesses for both sides."

Appellant further objected to the charge as a whole because it failed to "instruct the jury that it must presume that the defendant will remain in prison for his entire life when considering the evidence, if any, related to a 'continuing threat to society.' "

The matter of parole or a defendant's release thereon is not a proper consideration for a jury's deliberations in the punishment phase of a capital murder trial. *Stoker v. State*, 788 S.W.2d 1, 16 (Tex.Crim.App. 1989); *White v.*

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[56] Appellant argues that the fact he signed the document is the only relevant fact. He also states that the defense was prepared to prove he knew what the document meant when he signed it. We find this ironic considering appellant's earlier arguments that he was not intelligent enough to sign his confession or waive his *Miranda* rights.

State, 629 S.W.2d 701, 708 (Tex.Crim.App. 1981); *but see Simmons v. South Carolina*, ___ U.S. ___, 114 S.Ct. 2187 (1994). A jury's only task at the punishment phase is to answer the special issues as required in Article 37.071. *Stoker*, 788 S.W.2d at 16. It has also been consistently held that it is not error for a trial court to refuse appellant's requested instruction to the jury explaining the parole laws of this state. *Id.*; *O'Bryan v. Estelle*, 714 F.2d 365 (5th Cir. 1983), *cert. denied*, 465 U.S. 1013 (1984).

The effect of appellant's request and objection was to place the issue of parole before the jury. Because this was an impermissible area of inquiry for the jury, the trial court did not err. Further, appellant's "waiver" is no more than an attempt to create "life without parole," which the Legislature has not yet seen fit to create. Points of error 29 and 31 are overruled.

In point or error 30, appellant contends that the trial court failed to instruct the jury not to speculate on the possibility of parole if appellant were to receive life imprisonment. The trial court instructed the jury:

> In reaching your decision, you must not consider what effect, if any, the laws on parole will have upon a life sentence.

We do not perceive a difference between what appellant desired to have included in the charge and the trial court's actual instruction. Accordingly, we hold that appellant's point of error 30 is without merit and is overruled.

In appellant's 32nd point of error, he maintains that the trial court erred in overruling his motion for mistrial premised on the State's improper argument based on the

possibility of parole. Appellant complains of the following argument:

> Dr. Felix Pebbles (sic) . . . said that it is my further professional opinion, that if [appellant] were released from custody, that he would be dangerous to other persons. That was written on May 19, 1977. Two years later, and in August of 1979, (appellant) was released from custody on parole, less than sixty days later, he murdered and raped Pam Carpenter. You have a responsibility to see that that never occurs again.

Appellant did not object to the argument or request an instruction to disregard but moved for a mistrial after the jury had already retired to begin its deliberations.

The proper method of preserving error in cases of prosecutorial misconduct is to (1) object on specific grounds, (2) request an instruction that the jury disregard the comment, and (3) move for a mistrial. *Cook v. State*, 858 S.W.2d 467, 473 (Tex.Crim. App. 1993). By failing to object at the earliest possible moment, appellant has preserved nothing for our review. Tex. R. App. Proc. 52(a).

In points of error one through eleven and 78 through 80, appellant complains that the trial court submitted an improper jury instruction on mitigating evidence. We disagree.

At punishment, the jury must be allowed to consider and give effect to proffered evidence regarding the defendant's background, his character, and circumstances surrounding the offense that, reasonably, could be thought, mitigating and warranting a sentence less than death. *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Lockett v.*

Ohio, 438 U.S. 586, 605-06 (1978). As the Supreme Court stated in *Penry v. Lynaugh*:

> Underlying *Lockett* and *Eddings* is the principle that *punishment should be directly related to the personal culpability of the criminal defendant*. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.

492 U.S. at 319 (emphasis added).

The special issues required by Article 37.071 allow the jury to consider and give effect to most types of mitigating evidence. *Jurek v. Texas*, 428 U.S. 262, 273-74 (1976). However, defendants occasionally proffer mitigating evidence that is not relevant to the special issues or that has relevance to the defendant's moral culpability beyond the scope of the special issues. *Penry v. Lynaugh*, 492 U.S. at 329. In such a case, the jury must be given a special instruction in order to allow it to consider and give effect to such evidence. *Id.* The trial court in the instant case submitted the following charge:

> You are instructed that when you deliberate on the questions posed in the Special Issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the State or the defendant. A mitigating circumstance may include, but is not limited to, any

aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

We have already held that a nullification instruction such as this one is sufficient to meet the constitutional requirements of *Penry v. Lynaugh*. *Coble v. State*, 871 S.W.2d 192, 206-207 (Tex. Crim. App. 1993), *cert. filed; see also Coleman v. State*, 881 S.W.2d 344, 356 (Tex.Crim.App. 1994). Points of error one through eleven and 78 are overruled.

Appellant addresses points 11a and 11b in a footnote. Without citing any authority, he asserts that because the charge did not instruct the jury to construe the terms "reasonable" and "unreasonable" in the first and third special issues to encompass his mitigating evidence, the jury did not have a vehicle with which to give effect to such evidence. Appellant makes no further argument. We will not entertain arguments which are inadequately briefed. Tex. R. App. Proc. 74(f). Points of error 11a and 11b are overruled.

In points of error 79 and 80, appellant maintains that the instruction did not include a clear and accurate definition of mitigating evidence and circumstances. The trial court submitted the following definition:

> A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case.

Appellant does not contest this definition *per se*. He complains that the trial court limited its application by instructing the jury to "give effect and consideration to [the mitigating circumstances] in assessing the *defendant's personal culpability*" and by deciding whether a death sentence "is an appropriate response to the *personal culpability* of the defendant." He also asserts that by not defining "personal culpability," the instruction did not distinguish it from "guilt"; therefore, he argues, it allowed the jury to not consider any mitigating evidence that failed to cast a doubt on appellant's guilt. Again, we have previously approved the use of such an instruction. *See Coble*, 871 S.W.2d at 206-07; *Coleman*, 881 S.W.2d at 356. Points of error 79 and 80 are over-ruled.

In his 81st and 82nd points of error, appellant complains that the trial court violated the Eighth Amendment by instructing the jury that "you are not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling in considering all the evidence before you and in answering the special issue." Specifically, appellant argues that the instruction precludes the jury's proper consideration of his mitigating evidence.

We have already addressed the validity of this exact charge. *Wheatfall v. State*, 882 S.W.2d 829, 842 (Tex.Crim.App. 1994). Because appellant raises no novel argument to persuade us to revisit this holding, we overrule his 81st and 82nd points of error.

In points of error 83 through 86, appellant posits that the trial court erred in failing to instruct the jury that the burden of proof was on the State to disprove the existence of sufficient mitigating circumstances, and to prove beyond a reasonable doubt that there were insufficient mitigating circumstances to make the death sentence inappropriate. We disagree.

This Court has previously stated:

> Neither this Court nor the Texas Legislature has ever assigned a burden of proof on the issue of mitigating evidence. *See* Article 37.071. The Eighth and Fourteenth Amendments do not require that a burden be placed on the State. In a plurality opinion, the United States Supreme Court in *Walton v. Arizona* affirmatively declined to "adopt as a constitutional imperative a rule that would require the court to consider the mitigating circumstances claimed by a defendant unless the State negated them by a preponderance of the evidence." 497 U.S. 639, at 650, 110 S.Ct. 3047, at 3055, 111 L.Ed.2d 511, at 526 (1990) (plurality opinion). The plurality in *Walton* further held that it is not unconstitutional to place a burden on the defendant to establish sufficient mitigating circumstances by a preponderance of the evidence. *Id.* U.S. at 649-651, S.Ct. at 3055-56, L.Ed.2d at 525-27. Because neither legislation nor constitution places a burden of proof upon the State to negate the existence of mitigating evidence, we refuse to fault the trial court for failing to give the jury such an instruction.

Barnes, 876 S.W.2d at 330. We decline to reconsider the issue. Appellant's points of error 83 through 86 are overruled.

In appellant's 87th and 88th points of error, he contends that the trial court erred in not affirmatively submitting his defensive theory of mitigation. Specifically, appellant objected that the trial court failed "to submit each of the mitigating circumstances that [he] had clearly proffered for the jury's consideration – mental retardation, brain impairment, and child abuse." The State responds that there is no requirement that the mitigating factors be spelled out. We agree.

During punishment, jurors must not be precluded from considering any relevant mitigating evidence in answering the special issues. *Cuevas*, 742 S.W.2d at 345-36; *Allridge*, 850 S.W.2d at 482. However, the trier of fact is not mandated to give any specified weight to a particular piece of evidence. *Id.* "The amount of weight that the fact-finder must give any particular piece of mitigating evidence is left to the range of judgement and discretion exercised by each juror." *Id.*

Because each individual juror decides whether he believes a particular piece of evidence may or may not be mitigating, we conclude that it was not error for the trial court to deny appellant's objections to the charge. Points of error 87 and 88 are overruled.

Finally, in his 132nd point of error, appellant asserts that it would be cruel and unusual punishment under the

Eighth Amendment to execute a person like himself "given his mental retardation, brain damage, and history of suffering severe and protracted abuse as a child." He argues that, because of his mitigating circumstances, he lacked the moral culpability to be sentenced to death.

The Eighth Amendment does not preclude the execution of mentally retarded persons. *Penry v. Lynaugh*, 492 U.S. at 335-38. Nor is there authority stating that it is unconstitutional to execute persons who have brain damage or were abused as children. "So long as sentencers can consider and give effect to mitigating evidence of mental retardation in imposing sentence, an individualized determination of whether 'death is the appropriate punishment' can be made in each particular case." *Id.* The jury in the instant case had the means to consider all of the evidence, including appellant's mitigating circumstances, and yet determined that death was the appropriate punishment. Because appellant's sentence does not violate the Eighth Amendment, we overrule his 132nd point of error.

The judgment of the trial court is AFFIRMED.

Per Curiam[57]

(Delivered February 22, 1995)
En Banc
Publish

Clinton, Overstreet and Meyers, JJ., concur in the result

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[57] This opinion was originally prepared by Judge Charles F. "Chuck" Campbell prior to his leaving the Court.

JOHNNY PAUL PENRY, Appellant
NO. 71,130 v. Appeal from POLK County
THE STATE OF TEXAS, Appellee

CONCURRING OPINION

I concur in the disposition of point of error 26, believing the objection was sufficient to preserve the error but believe the error was harmless. Tex. R. App. P. 81(b)(2). I concur in the disposition of point of error 71 for the reasons stated in *Buchanan v. Kentucky*, 483 U.S. 402 (1987). I concur in the disposition of point of error 75, believing the statements of Dr. McClendon were erroneously admitted but the error was harmless. Rule 81(b)(2).

With these comments, I join only the judgment of the Court.

BAIRD, Judge

(Delivered February 22, 1995)

En banc

Publish

JOHNNY PAUL PENRY, Appellant

NO. 71,130 v. Appeal from POLK County

STATE OF TEXAS, Appellee

CONCURRING OPINION

I join the opinion of the majority, but write separately to add some additional comments related to appellant's points of error 107-110.

While I agree with the majority that the requested instruction on the defense of diminished capacity would have amounted to a comment on the weight of the evidence and was therefore properly denied, I write to caution that this conclusion should not be taken to mean that such a theory is not a viable one for the presentation of defensive evidence and argument. This Court has previously addressed the theory of diminished capacity,[1]

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[1] A distinction should be made between diminished capacity as an "affirmative defense" and diminished capacity as evidence rebutting the element of mens rea. For instance, in *United States v. Pohlot*, the Third Circuit made this critical distinction in interpreting the Insanity Defense Reform Act as barring evidence of mental disease or defect as an "affirmative defense" that "excuses" conduct, but not as evidence that simply disproves an element of the offense. 827 F.2d 889, 897 (3rd Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988). One commentator elaborated on the distinction between these concepts:

> [T]he mens rea variant of diminished capacity is not a separate defense that deserves to be called "diminished capacity" or any other name connoting that it is some sort of special, affirmative defense. [ ] The defendant is simply introducing evidence, in this case evidence of mental abnormality, to make the following claim: "I did not commit the crime charged because I did not possess the requisite mens rea." This is not an affirmative defense whereby the defendant admits or has proved against him the elements of the crime charged, but then raises a claim of justification or excuse. Further, a defendant claiming no mens rea because of mental disorder is not asserting some lesser form of legal insanity, that is, he is not claiming that he is partially or less responsible for the crime charged. Rather, the defendant is straightforwardly denying the prosecution's prima facia case by attempting to cast doubt on the prosecution's claim that a requisite mental element was present at the time of the offense. He is claiming that he is not guilty of that crime at all, although he may be guilty of a lesser crime if all the elements of the latter are proven.

Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75-1 J. CRIM. L. & CRIMINOLOGY 1, 6 (1984). In this opinion I speak in terms of the theory of "diminished capacity" meaning evidence of mental disease or defect, not amounting to legal insanity, offered to negate mental state.

A distinction should also be made between the terms "diminished capacity" and "diminished responsibility." As explained above, in the case of "diminished capacity," evidence of mental abnormality is offered for the purpose of negating culpable mental state. If the evidence successfully negates the mental element, the defendant is not guilty of the offense. By contrast, under the doctrine of "diminished responsibility" the defendant is claiming that due to his mental abnormality, he is not fully responsible for the crime. The theory is that "[e]ven if the technical elements of an offense are satisfied, the defendant is less culpable and should be convicted of a lesser crime, or, at least, should be punished less severely." *Id.* at 20; *see also United States v. Pohlot*, 827 F.2d 889, 903-06 (3rd Cir. 1987) (distinguishing doctrine of diminished responsibility from negation of mental state).

recognizing its validity but holding that it was inapplicable under the facts of the case.

In *Cowles v. State*, 510 S.W.2d 608 (Tex. Crim. App. 1974), the defendant claimed the trial court erred in excluding at the guilt stage on a charge of rape psychiatric testimony that although the defendant knew the difference between right and wrong, he was nevertheless extremely disturbed and mentally ill, with poor judgment and reasoning which impaired his ability to control himself. The Court said that the great weight of authority held that such evidence, falling short of insanity, was not admissible. The Court recognized an exception to this rule, however:

> An exception to this rule is where specific intent is an *element of the offense* for which the accused is being tried, as in the different degrees of murder and the "with intent" crimes.

Id. at 610. The Court held that such evidence was properly rejected in *Cowles* because specific intent was not an element of the crime at issue. *Id.*[2]

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[2] This Court spoke of diminished capacity in another case, *Wagner v. State*, 687 S.W.2d 303 (Tex. Crim. App. 1984). There, the defendant claimed that the exclusion of evidence of a physical condition at the guilt stage was error. The evidence was that shotgun pellets were situated in the defendant's head and he was mentally infirm. In its opinion on original submission, the Court held that the defendant was not entitled to admission of such evidence since he was charged with "intentionally *or knowingly*" causing the victim's death. The crime was therefore not a specific intent crime. *Id.* at 308 (op. on original submission) (citing *Cowles*). The Court granted the defendant's motion for rehearing to reconsider whether the evidence should have been admitted on the issue of intent. *Id.* at 309 (op. on reh'g). On rehearing the defendant pointed out that the trial court in fact charged the jury conjunctively rather than disjunctively on culpable mental state, so that the jury was charged to find that

Most of the state and federal courts recognize that evidence of diminished capacity is admissible to negate mental state. *See, e.g., United States v. Pohlot*, 827 F.2d 889, 897 (3rd Cir. 1987) (under Insanity Defense Reform Act

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the defendant "knowingly and intentionally" caused the death. We agreed with the defendant that the trial court's charge required the jury to find intent. *Id.* at 310-11 (op. on reh'g). However, we declined to accept the argument that the evidence of impaired mental functions was admissible at guilt under the facts of this case. We then inexplicably discussed the doctrine of diminished responsibility, confusing it with the doctrine of diminished capacity. Recognizing that other jurisdictions have held evidence of diminished capacity not amounting to insanity admissible to negate malice aforethought, we stated that although malice aforethought was not an element under § 19.02, when "sudden passion arising from an adequate cause" is raised it could function in the nature of a defense reducing the offense of murder to voluntary manslaughter; accordingly, if the defendant's evidence showed sudden passion, "the doctrine of diminished responsibility would mandate that the evidence be admitted." *Id.* at 311 (op. on reh'g). However, the evidence proffered in *Wagner* did not advance that issue and therefore was properly excluded:

> The import of appellant's proffered evidence is that the injury to his head possibly affects his impulse control, and that he seems to lack emotional contact with his surroundings. All that can be inferred from this evidence is that appellant may be more susceptible than the normal person to acting under the influence of a sudden passion. It does not further the proposition that appellant did in fact act under the influence of such a passion on the night of the offense. . . . Lack of normal impulse control is simply not a circumstance recognized by the Legislature to diminish criminal responsibility of an accused or reduce his crime to a lesser included offense.

Id.

evidence of mental disease or defect less than legal insanity admissible to disprove mens rea), *cert. denied*, 484 U.S. 1011 (1988); *United States v. Frisbee*, 623 F.Supp. 1217 (D.C. Cal. 1985) (under new federal statute and rules, expert testimony on mental disease or defect admissible to negate specific intent); *State v. Burge*, 487 A.2d 532, 539-40 (Conn. 1985) (evidence of mental disease or defect admissible to demonstrate absence of intent, general or specific), *Hendershott v. People*, 653 P.2d 385, 390-93 (Colo. 1982) (violates due process to prohibit evidence of mental disease or defect to negate essential culpability element), *cert. denied*, 459 U.S. 1225 (1983); *State v. McKenzie*, 608 P.2d 428, 452-53 (Mont.) (recognizing viability of diminished capacity defense under former common law and under current statute), *cert. denied*, 449 U.S. 1050 (1980). These courts reason that evidence tending to negate or raise a reasonable doubt as to an element of the State's case is relevant and generally admissible.[3] One court

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[3] As explained by one commentator:

> The "defense" at issue here, is one that at most simply negates a required state of mind. Like all such failure of proof defenses, it contains no special opportunity to exculpate the defendant apart from the standing requirements of the offense definition. . . . As long as a given state of mind is required by the offense definition, any evidence suggesting the absence of that required state of mind would necessarily be relevant and admissible, absent special restrictions, to determine whether all the required elements of the offense were satisfied.

ROBINSON, PAUL H., CRIMINAL LAW DEFENSES § 64(a) at 276 (1984) (footnote omitted).

views barring such evidence as contrary to our adversary system and as a violation of due process:

> A reasonable doubt as to guilt may arise not only from the prosecution's case, but also from defense evidence casting doubt upon what previously may have appeared certain. Denying the defendant any opportunity to controvert the prosecution's case by reliable and relevant evidence of mental impairment, in addition to cutting against our traditional concept of the

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Cowles and *Wagner* indicate that in Texas evidence of mental disease or defect is admissible to negate specific intent, but not lesser culpable mental states. Such a rule, admitting evidence to negate specific intent but not other culpable mental states, has been severely criticized. *Id.* at 277-78 (citing various criticisms of rule restricting such evidence to specific intent crimes). One commentator suggests that a rule of strict relevance would be more logically defensible and effective:

> . . . evidence of mental disease or defect often has little bearing on whether the defendant acted with purpose, knowledge, recklessness, or negligence. The definitions of these terms do not call for a "normative" assessment of blameworthiness; rather they call for specific findings concerning the actor's state of mind with respect to the objective elements of the offense, e.g., was the actor aware that his conduct would cause the death of a human being. Evidence concerning disorders that lead to impaired ability to control conduct, for example, is simply not relevant to the culpability required by such offense definition. A rule of strict relevance may well do more to limit improper psychiatric testimony than an arbitrary and artificial rule based on such distinctions as specific and general intent.

ROBINSON, PAUL H., CRIMINAL LAW DEFENSES § 64(a) at 38-39 (Supp. 1993).

> adversary system, downgrades the prosecution's burden to something less than that mandated by due process of law.

Hendershott, 653 P.2d at 393; *see also Pohlot*, 827 F.2d at 901 (suggesting that a rule barring evidence relevant to mens rea "may be unconstitutional"); *State v. Gonzales*, 681 P.2d 1368, 1372 (Ariz. 1984) (exclusion of evidence of mental disease when relevant to a material issue is a denial of due process).

Accordingly, I join the majority's opinion with the understanding that its holding does not limit the ability of a defendant to offer evidence and argument in support of a theory of diminished capacity.

MALONEY, J.

Delivered February 22, 1995
Publish

(10)

Supreme Court, U.S.
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No. 00-6677

In The

Supreme Court of the United States

JOHNNY PAUL PENRY,

Petitioner,

v.

GARY L. JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX
VOLUME IV, PAGES 795 TO 1063

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IN THE TEXAS COURT OF CRIMINAL APPEALS
AND THE 258TH JUDICIAL DISTRICT
OF POLK COUNTY, TEXAS

EX PARTE	§	Court of Criminal Appeals
JOHNNY PAUL PENRY	§	Cause No. 71,130
	§	258th District Cause No. 10,222
	§	

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Having reviewed the Applicant's Petition for a Post-Conviction Writ of Habeas Corpus (including the attached exhibits and affidavits); the State's Answer (including the attached exhibits and affidavits); the statement of facts from the motions hearing held on June 18, 1997, the statement of facts from the evidentiary hearing held on July 3, 1997, the transcript of the oral deposition of Santiago Caberto, M.D., the official court records and relying on personal recollection, the Court makes the following finding of fact and conclusions of law:

FINDINGS OF FACT

F1. On November 7, 1979, Applicant, Johnny Paul Penry, was charged by an indictment filed in the 258th Judicial District Court of Polk County, Texas, with the capital offense of intentional murder of Pamela Carpenter during the course of committing an aggravated rape. 1 TR 1.

F2. Venue was transferred to Trinity County where he was convicted of capital murder and sentenced to death.

F3. Applicant's conviction and sentence were affirmed on direct appeal. *Penry v. State*, 691 S.W.2d 636 (Tex. Crim. App. 1985), *cert. denied sub nom. Penry v. Texas*, 474 U.S. 1073 (1986).

F4. On federal habeas review, however, the Supreme Court ultimately held that Applicant's eighth and fourteenth amendment rights were violated at the punishment phase of his trial. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

F5. Following remand, Applicant was retried in state court. Venue was transferred to Walker County, and Applicant was tried before a jury upon a plea of not guilty.

F6. Prior to retrial, Applicant was housed on death row at the Ellis I Unit of the Texas Department of Criminal Justice.

F7. On July 9, 1990, the jury found Applicant guilty of the capital offense. 4 TR 1005.

F8. A separate punishment hearing ensued and, on July 17, 1990, the jury answered affirmatively the three special issues submitted pursuant to former article 37.071(b) of the Texas Code of Criminal Procedure. 5 TR 1331-32.

F9. In accordance with law, the trial court assessed punishment at death.

F10. Appeal was automatic to the Court of Criminal Appeals, which affirmed the conviction and sentence in an opinion delivered February 22, 1995, and denied rehearing on June 7, 1995. *Penry v. State*, 903 S.W.2d 715 (Tex. Crim. App. 1995).

F11. The Supreme Court denied Applicant's petition for writ of certiorari on November 13, 1995. *Penry v. Texas*, 116 S. Ct. 480 (1995).

F12. The Supreme Court denied Applicant's motion for rehearing on January 8, 1996.

F13. Following Applicant's request for appointed counsel to pursue state habeas relief, the Court of Criminal Appeals appointed John E. Wright on July 25, 1996, pursuant to article 11.071 of the Texas Code of Criminal Procedure.

F14. Pursuant to Article 11.071, § 4(a), Applicant's brief was due on October 20, 1996. Pursuant to an order of the Court of Criminal Appeals entered October 9, 1996, Applicant filed an incomplete application for writ of habeas corpus with the district court on October 17, 1996.

F15. Thereafter, Applicant sought and was granted an extension to file his complete application until April 20, 1997.

F16. On April 21, 1997[1] Applicant filed his complete "Petition for a Post-Conviction Writ of Habeas Corpus" asserting nine separate claims for relief.

F17. On May 21, 1997 the State filed the "Answer of the State of Texas to Applicant Johnny Paul Penry's Petition for a Post-Conviction Writ of Habeas Corpus."

F18. Pursuant to Section 9 of Art. 11.071 of the Texas Code of Criminal Procedure, the District Court scheduled an evidentiary hearing for July 3, 1997 to address the

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[1] April 20, 1997 was a Sunday.

claims asserted by Applicant in Count I of his timely application.

F19. After the State filed its answer to Applicant's original petition, on May 30, 1997 Applicant filed a "Supplement to Count I of Applicant Johnny Paul Penry's Petition for a Post-Conviction Writ of Habeas Corpus."

F20. On June 10, 1997 Applicant filed a "Motion for Leave to File and Present Evidence in Support of His Supplement to Count I of His Application for a Writ of Habeas Corpus."

F21. The State opposed Applicant's motion and proposed supplement to Count I as untimely.

F22. The Court scheduled a hearing on Applicant's motion for June 18, 1997 at which time testimony was heard by the Court regarding the timeliness of Applicant's Supplement to Count I of his application.

F23. Following the hearing, the Court ruled that although Applicant's position appeared to have changed, the issues presented in Applicant's Supplement were so closely related to the issues presented in the original petition that evidence covering all of the issues could be presented at the July 3, 1997 hearing. Motions Hearing Transcript at pp. 60-61.

F24. Pursuant to Section 9(a) of Article 11.071, the Court permitted the parties to propound interrogatories in preparation for the July 3, 1997 hearing.

F25. On July 3, 1997, pursuant to Article 11.071, Section 9 the Court conducted an evidentiary hearing on the allegations raised in Count I of Applicant's original and supplemental applications.

F26. Prior to the July 3, 1997 evidentiary hearing, Counsel for Applicant sought an abatement of the proceedings on the basis of a claim that Applicant is incompetent to participate in the habeas proceedings.

F27. Applicant has twice been found competent to stand trial, most recently in 1990.

F28. Applicant is no longer receiving any psychiatric medication. EHSOF Vol. 1, p. 146.

Cl. Applicant's alleged incompetency failed to state a basis for abating the habeas proceedings. Applicant does not identify any authority requiring that an applicant be competent to assist in his habeas proceeding.

C2. In the alternative (to C1), Applicant has failed to alleged sufficient facts to call into question his competency, particularly in light of the two prior adjudications of competency. *See and compare Ford v. Wainwright*, 477 U.S. 399, 417 (1986) (Marshall, J., writing for the plurality) ("It may be that some high threshold showing on behalf of the prisoner will be found a necessary means to control the number of nonmeritorious or repetitive claims of [incompetency for execution]."); Id. At 426 (Powell, J., concurring) (if defendant previously adjudged competent to stand trial, "[t]he State . . . may properly presume that [the] petitioner remains sane at the time sentence is to be carried out, and may require a substantial threshold showing of insanity merely to trigger the hearing process.").

F29. On July 3, 1997, the Court conducted an evidentiary hearing on the allegations of Count I of Applicant's original and supplemental allegation.

I.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO COUNT I OF APPLICANT'S PETITION FOR A POST-CONVICTION WRIT OF HABEAS CORPUS

A.

PRELIMINARY FACTUAL FINDINGS AS TO COUNT I

F30. At the July 3, 1997 evidentiary hearing, the Court considered the following issues presented in Count I of Applicant's petition:

A. Whether the State failed to disclose a change to Applicant's psychiatric medication prescription prior to his competency trial in violation of *Brady v. Maryland;*

B. Whether the State failed to disclose changes to the timing of the administration of Applicant's psychiatric medication during the guilt/innocence trial in violation of *Brady v. Maryland;*

C. Whether the State violated *Giglio v. United States* by allowing a witness to give false testimony;

D. Whether changes, if any, to Applicant's psychiatric medication constituted a violation of Applicant's rights under *Riggins v. Nevada,* 112 S.Ct. 1810 (1992).

F31. Throughout the latter 1980's and early 1990, Applicant was prescribed various psychiatric medications. EHSOF Vol. 2 p. 216. The fact that Applicant's trial counsel were aware that their client was prescribed psychiatric medication at the time of the 1990 court proceedings is not in dispute. Motions Hearing Transcript p. 42.

F32. Applicant was primarily treated with anti-depressants. EHSOF Vol. 2 p 216.

F33. On March 23, 1989, Applicant's prescription was changed to discontinue Mellaril and change to Triavil 2-25, to be given orally, one tablet at noon and the other at the hour of sleep. State's Exhibit 1 at page 223.

F34. Triavil is a commercial formulation of two drugs, amitriptyline, which is an anti-depressant, and perphenazine, which is an anti-psychotic. EHSOF Vol. 1 p. 117. Triavil 2-25 contains 2mg of perphenazine and 25mg of amitriptyline. Affidavit of Jonathon J. Lipman, Exhibit "A" to Applicant's Application.

F35. Throughout 1989, Applicant's Texas Department of Criminal Justice (TDCJ) mental health records indicate that his medical and mental diagnosis included mild mental retardation with behavioral symptoms, anti-social personality disorder and hypoglycemia. State's Exhibit 1 pp. 239-50.

F36. On April 6, 1989 Applicant's Triavil prescription was changed to require one Triavil 4-50 at noon and one Triavil 4-25 at the hour of sleep. State's Exhibit 1 p. 222.

F37. The April 6, 1989 prescription was continued throughout the remainder of 1989. State's Exhibit 1 p. 214-20.

F38. The TDCJ medical records indicate that Applicant was examined by a TDCJ psychiatrist on February 5, 1990 and the Applicant's Triavil prescription was modified to require a Triavil 2-25 in the a.m. and a Triavil 2-25 in the p.m.. This chart entry reflects that while Applicant

was given Elavil previously he had been paranoid and was "hearing voices." The chart entry further reflects that on February 5, 1990, Applicant reported that he was "doing fine and is not having any problems except for worrying about his case." State's Exhibit 1 p. 213.

F39. On March 5, 1990, the TDCJ records reflect that Applicant was again examined by a psychiatrist. The chart entry reflects that Applicant reported that he had been "eating okay" but had been "worrying about his case so doesn't sleep as well." Applicant felt that his "meds" were too strong and reported that he had refused his "meds" from one nurse because they were on bad terms. The chart entry reflects that Applicant was concerned about his safety at court and was also concerned that the victim's family might have a plot on his life. The Triavil prescription was adjusted to include a Triavil 2-10 in the a.m. and a Triavil 2-25 in the p.m. State's Exhibit 1 p. 211.

F40. On April 2, 1990 Applicant was again examined by a TDCJ psychiatrist and his Triavil prescription was modified. It is this change to Applicant's medication that Applicant asserts as his principal claim. On April 2, 1990 the chart entry reflects that Applicant reported feeling a "little paranoid" and was concerned that "the officers may try to hurt him when they take him to court." Applicant was concerned that the officers were talking about him. He reported that he was eating okay but was not sleeping well. He reported that he was happy his case had been moved to Huntsville. His Triavil prescription was changed to include a Triavil 4-50 and a Triavil 2-10 to be given together p.m. He was also prescribed Cogentin 1mg twice daily as needed. State's Exhibit 1 p. 209-10.

F41. On April 23, 1990, three weeks following the April 2, 1990 prescription change, the TDCJ medical records reflect that Applicant reported that he had hurt his ankle while playing basketball. State's Exhibit 1 p. 208.

F42. The April 2, 1990 Triavil prescription was continued on April 26, 1990 and the Cogentin was prescribed twice daily. State's Exhibit 1 p. 208.

F43. Pat Piatkowski, an Ellis I Unit psychiatric nurse, visited Applicant on April 25, 1990. State's Exhibit 1 p. 260. During that visit, Applicant denied experiencing any symptoms or side effects – including "EPS" or extra-parametal side effects – associated with his psychiatric medication. State's Exhibit 1 p. 260.

F44. Piatkowski testified that as a psychiatric nurse she was personally concerned about the possibility that inmates taking psychiatric medications might be experiencing side effects from the medication.

F45. On April 25, 1990, Piatkowski determined that Applicant was not experiencing side effects from his medication. EHSOF Vol. 2 p. 259.

F46. On April 26, 1990 Applicant was seen by T.D.C.J. psychiatrist Santiago Caberto. During the visit, Applicant spoke with Dr. Caberto concerning his upcoming trial and the possibility of a change of venue. Applicant expressed to Dr. Caberto that he was concerned about being transferred to the Walker County Jail. Applicant told Dr. Caberto that he took his medication and needed it to relax. At the time of the visit, Dr. Caberto described Applicant as alert and oriented times three

which Dr. Caberto explained meant that Applicant was oriented as to time and place. Dr. Caberto explained that he would not have described a person as alert and oriented if the person was experiencing significant depression or psychosis. Deposition of Santiago Caberto, M.D. p. 53-54.

F47. Applicant's competency trial commenced with jury selection on Monday, May 7, 1990.

F48. Throughout Applicant's court proceedings in 1990 Applicant remained housed at the Ellis I Unit of the Texas Department of Criminal Justice which is in Walker County, Texas, the location of Applicant's trial. Applicant's trial counsel never objected to Applicant remaining at the Ellis I Unit throughout the court proceedings. Motions Hearing Transcript p. 41-42.

F49. Prior to commencement of the competency trial, Applicant was examined for competency during the latter part of April by the State's psychologist Dr. Walter Quijano. Applicant was subject to the April 2, 1990 Triavil prescription at the time of Dr. Quijano's interview. During his competency trial testimony, Dr. Quijano pronounced Applicant competent to stand trial. Dr. Quijano did not mention in his trial testimony any problems that he observed regarding Applicant's Triavil prescription. 90SOF[2] Vol. 12 p. 921-26.

F50. Applicant was also examined by the Defense psychologist Dr. Randall Price on April 20, 1990, May 8,

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[2] 90SOF refers to the Statement of Facts from the 1990 court proceedings.

1990(the Tuesday following jury selection in the competency trial) and June 13, 1990. Although Dr. Price was of the opinion that Applicant was incompetent, the Court finds it noteworthy that Dr. Price testified that during his visits with Applicant he found no evidence of mental disorder other than mental retardation. Dr. Price specifically testified that he found no evidence of psychosis. Presumably, Dr. Price, having obtained Applicant's history, was aware that Applicant was being administered Triavil. Dr. Price in his trial testimony did not mention any observation of possible problems that Applicant was experiencing with his psychiatric medications. 90 SOF Vol. 48 pp. 1310-11 & Vol. 49 1439-45.

F51. Applicant was also examined by Dr. Fred Fason, a psychiatrist testifying for the State, during the last week of April and on May 4, 1990. Dr. Fason specifically testified at trial that he was aware that Applicant was being administered Triavil. Dr. Fason testified that Applicant was competent to stand trial and stated that during his visits with Applicant he could detect no signs of mental illness or psychosis. Fason testified that during his visits with Applicant, Applicant had no problems communicating.90SOF Vol. 12 p. 981-85, 1000. Importantly, Fason did not testify as to observing any problems with Applicant that might have been associated with the Triavil prescription.

F52. On Wednesday, May 9, 1990 Applicant was transported to The University of Texas Medical Branch in Galveston for an EEG. During the EEG test, Applicant was described as alert and cooperative.

F53. On May 7, 1990, during the jury selection for the competency trial, Applicant's attorney John Wright questioned a juror about Cogentin, which as noted above, was first prescribed to Applicant on April 2, 1990. 90SOF Vol. 8 p. 194.

F54. Dr. George Mount, a psychologist, testified for the defense during the competency trial on May 14, 1990. Dr. Mount testified that he had been previously provided Applicant's medical records from T.D.C. When questioned if he was aware that Applicant had been prescribed psychotropic medications, Mount testified that he was aware that Applicant had been prescribed Triavil, Cogentin and Elavil. 90SOF Vol. 11 pp. 699, 700, 757.

F55. During the competency trial the defense had marked for identification purposes, Applicant's TDCJ medical records which included the April 2, 1990 prescription which now forms the principal basis of Applicant's habeas claim. State's Evidentiary Hearing Exhibits 4-A, 4-B and 4-C (formerly Defense Competency Trial Exhibits 6-A, 6-B and 6-C for identification).

F56. The competency trial concluded on Wednesday, May 16, 1990 with the jury finding that applicant was competent to stand trial.[3] 90SOF Vol. 8 p. 1076.

F57. TDCJ Medication Compliance records produced in habeas discovery are silent as to whether Applicant was administered Triavil on May 7, 8, 9, 10, 11, 12, 14 and 16, 1990. The records do reflect that Applicant was administered Triavil on May 13 and 17, 1990 as well as

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[3] Applicant had also been found competent to stand trial prior to this first trial in 1980.

other days throughout the month of May except as otherwise noted. The same TDCJ Medication records reflect that Applicant was administered Cogentin on May 8, 9 and 16. The records indicate that Applicant refused Cogentin on May 6, 7, 8, 10, and 13, 1990. State's Answer Exhibit "G ."

F58. Applicant was in Court for competency trial proceedings on May 7, 10, 11, 14, 15 and 16. As previously noted, Applicant was examined by Dr. Price on May 8, 1990 and was transported to UTMB Galveston on May 9, 1990.

F59. At no time prior to or during the competency trial did Applicant or his trial counsel complain of or object to the administration of Triavil or other psychiatric medication to Applicant.

F60. At no time prior to or during the competency trial did Applicant's trial counsel ever advise the court of any physical or mental problems that Applicant might have been experiencing which might have been occasioned by the administration of Triavil to Applicant.

F61. Applicant's TDCJ medical records contain numerous instances of Applicant requesting or refusing various medications or medical services from the TDCJ medical staff. However, Applicant's TDCJ medical records do not reflect that Applicant complained of not receiving, or that he otherwise requested, his Triavil medication at any time during the competency trial in May of 1990.

F62. Applicant's trial counsel never complained to the court of Applicant not receiving his Triavil medication during the May 1990 competency trial.

F63. On May 22, 1990 Applicant was seen by psychiatric nurse Pat Piatkowski who described Applicant as "cheerful" and voicing no complaints. State's Exhibit 1 p. 258.

F64. Voir Dire for the capital murder trial commenced on May 22, 1990. Individual Voir Dire continued through June 25, 1990.

F65. On June 26, 1990 Applicant was seen by psychiatric nurse Pat Piatkowski whose chart entry reflects that Applicant voiced no complaints. State's Exhibit 2 p. 17.

F66. On May 24, 1990, Applicant's prescription was continued at Triavil 4-50 and Triavil 2-10 to be administered p.m. and Cogentin 1 mg twice daily. State's Exhibit 1 p. 207.

F67. On June 26, 1990 Applicant was again observed by psychiatric nurse Pat Piatkowski and voiced no complaint at the time. State's Exhibit 2 p. 17.

F68. The evidentiary portion of the capital murder trial commenced on July 2, 1990.

F69. .On July 9, 1990 following closing arguments of counsel, the jury found Applicant guilty of capital murder.

F70. The punishment phase of the capital murder trial commenced on July 11, 1990.

F71. On July 17, 1990 the punishment phase of the trial concluded and the jury answered the special issues resulting in Applicant's death sentence.

F72. On July 11, 1990, the medical records indicate that Applicant complained to George Wheat[4], a Ellis I Unit psychologist, of "having problems coping with pressures." Applicant reported to Wheat that his trial was in the punishment stage. Wheat characterized Applicant as "alert, oriented, slightly agitated." The chart entry suggested that the Applicant's "primary concern is to get meds before he leaves for trial in a.m." State's Exhibit 2 p. 16-17.

F73. On July 11, 1990 the only medication that Applicant was prescribed to take in the "a.m." was Cogentin. There is no evidence that Applicant was ever administered anything other than Cogentin before court in the "a.m." EHSOF Vol. 1 p. 174.

F74. In September of 1990, following Applicant's capital murder trial, Applicant requested that his Triavil prescription be discontinued. State's Exhibit 2 p. 8.

F75. Dr. Caberto discontinued Applicant's Triavil and Cogentin prescriptions on October 8, 1990. State's Exhibit 2 p. 8.

F76. On October 19, 1990, Applicant filed a sick call request requesting that his medications be renewed. State's Exhibit 2 p. 8.

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[4] Wheat testified on Applicant's behalf during the competency trial.

F77. Dr. Caberto visited Applicant on October 25, 1990. On that visit, Applicant requested that his Triavil and Cogentin prescriptions be renewed because he was having difficulty sleeping and the medications made him feel relaxed. Applicant specifically requested that Dr. Caberto renew his prescription for Triavil 4-50 and Cogentin, but not for Triavil 2-10. State's Exhibit 2 p. 12.

F78. On October 29, 1990, four days after Dr. Caberto renewed Applicant's prescription for Triavil and Cogentin, Applicant was found to be selling the drugs prescribed for him. State's Exhibit 2 p. 7.

B.

FINDINGS AND CONCLUSIONS AS TO APPLICANT'S CLAIMS THAT THE STATE FAILED TO DISCLOSE A CHANGES TO APPLICANT'S PSYCHIATRIC MEDICATION IN VIOLATION OF *BRADY V. MARYLAND*

F79. As previously noted, Applicant Assert's in Count I that the State violated *Brady v. Maryland* by failing to disclose to Applicant's counsel the change in Applicant's Triavil prescription on April 2, 1990. Applicant also complains that his prescription was changed "while his trial was underway" and that his counsel were not advised of same. In his supplemental petition Applicant also complains that the State violated *Brady* by failing to advise his trial counsel that his medication was interrupted during the competency trial.

C3. In order for Applicant to establish a right to habeas relief due to the State's failure to disclose exculpatory evidence, he must prove the following: (1) the State

suppressed or withheld evidence (2) which was favorable to the defense and (3) material to the defense. *Moore v. Illinois*, 408 U.S. 786, 92 S. Ct. 2562 (1972); *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963); *Ogle v. Estelle*, 641 F.2d 1122 (5th Cir. 1981). *See also Kyles v. Whitley*, 115 S. Ct. 1555,1567 (1995).

C4. Because *Brady* only assures that an accused is not denied access to materially favorable evidence known to the government but unknown to him, no Brady violation occurs if evidence in the possession of the government could have been discovered through the exercise of reasonable diligence by the defense. *See, West v. Johnson*, 92 F.3d 1385, *Williams v. Scott*, 35 F.3d 159, 163 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 959 (1995); *May v. Collins*, 904 F.2d 228, 231 (5th Cir. 1990); *Matheson v. King*, 751 F.2d 1432, 1444 (5th Cir. 1985), *cert. dismissed*, 475 U.S. 1138, 106 S. Ct. 1798 (1986).

F80. Applicant and Applicant's counsel were aware of the change to Applicant's prescription on April 2, 1990.

F81. Even if Applicant's counsel was not aware of the change to Applicant's prescription on April 2, 1990, he could have been aware of same through the exercise of reasonable diligence.

C5. Because Applicant and his counsel were aware of the change to Applicant's prescription on April 2, 1990, or Applicant's counsel could have discovered the change to Applicant's prescription through the exercise of reasonable diligence, no violation of Applicant's right to due process pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) occurred. *See, West v. Johnson*, 92 F.3d 1385, *Williams v. Scott*, 35 F.3d 159, 163 (5th Cir. 1994), *cert. denied*, 115

S. Ct. 959 (1995); *May v. Collins*, 904 F.2d 228, 231 (5th Cir. 1990); *Matheson v. King*, 751 F.2d 1432, 1444 (5th Cir. 1985), *cert. dismissed*, 475 U.S. 1138, 106 S. Ct. 1798 (1986).

F82. Applicant also complains that the State failed to inform his trial counsel that his medical treatment was changed while the trial was underway. Specifically, Applicant claims that he was being instructed to take his medication in the morning "before going to the courthouse."

F83. There is no evidence that Applicant ever took any medication in the morning prior to leaving for the Courthouse other than Cogentin, which is reflected in the Applicant's medical records.

F84. Applicant was fully aware of the medication he was taking an was capable of informing counsel of same.

F85. Even if Applicant's counsel were not aware of the medication Applicant took in the morning prior to leaving for court, he could have been aware of same through the exercise of reasonable diligence.

C6. Because Applicant was aware and his counsel was aware of, or could have discovered, the medication Applicant was taking in the mornings prior to leaving for court, no violation of Applicant's right to due process pursuant to *Brady v. Maryland, supra*, occurred. *See, West v. Johnson*, 92 F.3d 1385, *Williams v. Scott*, 35 F.3d 159,163 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 959 (1995); *May v. Collins*, 904 F.2d 228, 231 (5th Cir. 1990); *Matheson v. King*, 751 F.2d 1432, 1444 (5th Cir. 1985), *cert. dismissed*, 475 U.S. 1138, 106 S. Ct. 1798 (1986).

F86. Applicant also complains in his supplemental petition that his medication was interrupted during the competency trial. Applicant's claim in this regard is entirely based upon the TDCJ medication dispensing records produced during habeas discovery which contain no entries respecting the administration of Triavil for several days during the competency trial. State's Answer Exhibit "G."

F87. During the evidentiary hearing, Applicant presented no evidence, other than the aforesaid TDCJ medication dispensing records, suggesting that Applicant was not administered his psychiatric medications during the competency trial.

F88. Although Applicant was found competent to stand trial there is no evidence that Applicant ever notified his attorneys, or that his attorneys notified the Court, that Applicant was not receiving his medication.

F89. At the motions hearing held on June 18, 1997 Applicant's counsel was questioned by the attorney for the State as to whether there was evidence, other than the dispensing records, to support the proposition that Applicant was not given his medication during the competency trial. Applicant's counsel replied "That is all we have got to go on right now." Motions Hearing Statement of Facts p. 37. No additional evidence respecting this claim was presented at the July 3, 1997 evidentiary hearing.

F90. Although Applicant's TDCJ medical records reflect that Applicant requested medication and medical treatment on various occasions throughout his incarceration, there is no indication in the medical records during

the month of May, 1990 that Applicant ever requested his psychiatric medication or complained to prison authorities of not receiving his medication. State's Exhibits 1 & 2.

F91. Although the medication dispensing records are silent with respect whether or not Applicant was administered Triavil during the competency trial, the testimony of Matthew Keith, Associate Directory ofUniversity of Houston Correctional and Managed Care Health Services which provides contract pharmacy services to TDCJ, at the evidentiary hearing, indicates that it is possible that Applicant was administered Triavil on the dates in question without such administrations being electronically documented on the TDCJ computers. EHSOF Vol. 1 p. 85-86. The Court finds it likely that on the dates in question, when the death row afternoon medication rounds were made (when Applicant was customarily administered his Triavil) Applicant was out of his cell, either in court, being examined by Dr. Randall Price, or being tested at UTMB Galveston. The testimony of Applicant's witnesses Matthew Keith and Nurse Barbara Brunick indicate that there were times when the TDCJ computer would be down and the procedure for documenting the administration of medication disrupted. The Court finds that it is entirely possible that Applicant's frequent absences from his cell during the competency trial, coupled with computer difficulties, could have resulted in the administration of Applicant's Triavil not being documented. EHSOF Vol. 1 p. 92, 106-11.

92. Although the medication dispensing records may be of some relevance to the question of whether Applicant was *offered* his medication, even on the dates where the records show that Applicant was offered his

medication the records do not establish that Applicant actually *took* his medication after it was offered. EHSOF Vol. 1 p. 82-86. This is especially troubling in view of the indication in Applicant's medical records that Applicant was reported to have been selling his drugs. State's Exhibit 2 p. 7.

C7. Assuming that Applicant did not receive his Triavil prescription as prescribed during the competency trial, the State did not suppress or withhold such evidence because the State was not aware that Applicant had not received any prescribed medication.

C8. Assuming that Applicant did not receive his Triavil medication as prescribed, no violation of Applicant's right to due process of law occurred, because Applicant was aware of not having received his medication and could have informed his counsel of same. *See, West v. Johnson*, 92 F.3d 1385, *Williams v. Scott*, 35 F.3d 159, 163 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 959 (1995); *May v. Collins*, 904 F.2d 228, 231 (5th Cir. 1990); *Matheson v. King*, 751 F.2d 1432, 1444 (5th Cir. 1985), *cert. dismissed*, 475 U.S. 1138, 106 S. Ct. 1798 (1986).

C9. Assuming that Applicant did not receive his Triavil medication as prescribed, no violation of Applicant's right to due process of law occurred because Applicant's counsel could have discovered same through the exercise of reasonable diligence. *See, West v. Johnson*, 92 F.3d 1385, *Williams v. Scott*, 35 F.3d 159, 163 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 959 (1995); *May v. Collins*, 904 F.2d 228, 231 (5th Cir. 1990); *Matheson v. King*, 751 F.2d 1432, 1444 (5th Cir. 1985), *cert. dismissed*, 475 U.S. 1138, 106 S. Ct. 1798 (1986).

WHETHER THE STATE SUPPRESSED OR WITHHELD EVIDENCE

F93. Assuming that Applicant was not administered his Triavil during the competency trial as prescribed, Applicant has presented no evidence that the attorneys for the State during the 1990 trial were aware of same.

F94. Applicant further fails to demonstrate that Applicant himself could not have made his counsel aware of any problems he was experiencing relative to the administration of his medication. Applicant was found competent to stand trial and the TDCJ medical records reflect that he was capable of communicating with his medical providers regarding his medication and medical care to the point that he apparently was able to communicate to his psychiatrist what medication he thought he should be prescribed. State's Exhibit 2 p. 12 and Deposition of Santiago Caberto, M.D. at p. 81.

F95. Although Applicant seeks to impute the knowledge of the TDCJ medical providers to the State's trial counsel by characterizing them as part of the "prosecution team" Applicant fails to demonstrate that TDCJ had any interest whatsoever in the outcome of Applicant's second trial.

F96. While Applicant relies heavily upon the fact that the State called TDCJ employees as witnesses during the competency trial, the Court finds that Applicant also called TDCJ employees as witnesses at the competency trial including George Wheat, Applicant's TDCJ psychologist. 90SOF Vol. 10 p. 789.

F97. At the July 3, 1997 evidentiary hearing, Applicant called Frank Blazek ("Blazek") as a witness. Blazek was the former District Attorney of Walker County which was the location of Applicant's trial and the Ellis I Unit of TDCJ. EHSOF Vol. 1 p. 189. While Blazek testified that TDCJ and its employees were generally cooperative with prosecutors, he further testified that TDCJ considered medical records confidential and required a subpoena from the State before releasing them. EHSOF Vol. 1 p. 195-96. Blazek testified that he never recalled getting medical or psychiatric records concerning an inmate without a subpoena. EHSOF Vol. 1 p. 195-96. Blazek testified that he felt that if the defense was interested in the medical records that it was their responsibility to subpoena them. EHSOF Vol. 1 p. 196.

F98. The Court is aware of no authority which would have required the Attorneys for the State to inquire on a daily basis as to whether Applicant was being administered his medication and to advise Applicant's counsel of same. The Court finds no reason why Applicant himself could not have reported any failure to receive his medication.

C10. Assuming that Applicant was not getting his Triavil during the competency trial, the Court finds that the State did not suppress or withhold such evidence and Applicant has failed to establish this aspect of his *Brady* claim.

WHETHER THE EVIDENCE WAS FAVORABLE TO THE DEFENSE

C11. Assuming that Applicant was not receiving his Triavil and assuming his counsel were not aware of same, Applicant must establish that such evidence would have been favorable to his claim of incompetence.

F99. The Court finds that the principal basis of Applicant's claim of incompetence was based upon his claimed mental retardation.

F100. Although there was discussion during the competency trial about Applicant's psychiatric condition, same was never the principal thrust of Applicant's claim.

F101. As the Court has previously found, Applicant's counsel were obviously aware at the time of the competency trial that Applicant had been prescribed Triavil and Cogentin.

F102. To the extent that Applicant's medication was an issue during the competency trial, it was Applicant who attempted to use the fact that he was prescribed such medication as evidence of his incompetence.

F103. At the competency trial Applicant's expert psychologist, Dr. George Mount, testified as follows:

> Q. In the medical records, did you find indications of prescription type drugs?
>
> A. I saw some, indications of psychotropic medication.
>
> Q. What one?

> A. Different ones. Triavil, Cogenent (sic), Elavil, anti-depressant, anti-psychotic medication.
>
> Q. What effect would those drugs have on a person?
>
> A. Well, the purpose of them, and the reason that they are used, is to change people's behavior. The alter the brain function so they are called psychotropic. Psycho is the mind, trophic, is to return something. You are turning the mind so if a person is depressed, give him something to make him less depressed, give him something to control that, bring him back in the normality range, and that is the reason psychiatrists use those drugs.
>
> Q. Well, would those drugs ordinarily be prescribed to a person who didn't need them?
>
> A. No. You would obviously have some clear symptoms that is the reason that they are prescribed, for psychiatric disturbances.
>
> Q. Would they tend to make a person, at least appear to be more normal than they are?
>
> A. Well, that is the purpose of the drugs, is to make the person appear to function more normally, and hopefully to function in the world as opposed to an institution. That is the reason for the drug.
>
> Q. So, that if a person was given these drugs daily, while he was going to Court, in a trial like this one, might have that effect on him right here and now?

A. Sure, He would appear competent. Take the person off drugs, probably, exhibit a behavior again, activity, what have you.

90SOF Vol. 11 p. 757-59.

F104. Assuming that Applicant was not receiving his Triavil as contended, during the competency trial, in light of the foregoing testimony by Applicant's expert, it would appear that the failure to administer Triavil to Applicant would have, if anything, been *favorable* to the Applicant.

F105. The competency trial jury, having viewed Applicant in the courtroom throughout the trial, found Applicant competent. Assuming that Dr. Mount's testimony would not have changed if Applicant was, in fact, not being given Triavil, the jury's impression of Applicant would have been based upon an unmedicated Applicant, or an Applicant displaying his true demeanor, rather than the medicated, and masked, Applicant that his attorneys attempted to create.

C12. The Court finds that the evidence of the failure, if any, of Applicant to receive his Triavil would not have been favorable to the Applicant's incompetency claim and as such Applicant fails in this aspect of his *Brady* claim.

WHETHER THE EVIDENCE WAS MATERIAL TO THE DEFENSE

F106. Assuming that Applicant was not receiving his Triavil and assuming his counsel were not aware of

same, Applicant must establish that such evidence would have been material to his claim of incompetence.

C13. Evidence is "material" only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682-84, 105 S. Ct. 3375, 3383-84 (1985). *Accord Kyles v. Whitley*, 115 S. Ct. at 1565. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome of the trial. *Kyles v. Whitley*, 115 S. Ct. at 1566; *Bagley*, 473 U.S. at 678, 105 S. Ct. at 3381.

C14. The Court finds that the great weight of the credible evidence presented in this cause suggest that neither the administration of Triavil to Applicant nor the possible failure to administer same was material to the issue of Applicant's competence to stand trial.

F107. On June 6, 1990, Applicant's principal medical diagnosis, as document by the TDCJ staffing form, were mild mental retardation, anti-social personality and hypoglycemia. State's Exhibit 2 p. 34.

F108. With respect to the Triavil prescribed to Applicant in May of 1990, both the State's expert and the Applicant's expert agreed that the dosage prescribed was small and below the recommended maintenance dosage for the majority of the population as indicated by the Physician's Desk Reference. EHSOF Vol 1 p. 163-64.

F109. At the evidentiary hearing Applicant called as his first witness, Edward B. Gripon ("Gripon"), the State's expert. EHSOF Vol. 1 p. 21.

F110. Gripon testified that he is a psychiatrist in private practice in Beaumont, Texas with a faculty appointment as an Associate Professor of Psychiatry at the University of Texas Medical Branch in Galveston. EHSOF Vol. 1 p. 22. Gripon is board certified in General Psychiatry and Forensic Psychiatry. EHSOF Vol. 2 p. 210.

F111. Gripon testified that he reviewed Applicant's medical records from the 1980's to the early 1990's. EHSOF Vol. 1 p. 25.

F112. Gripon testified that during 1990 Applicant was taking Triavil, and Cogentin for the purpose of offsetting side-effects, if any, associated with the Triavil. EHSOF Vol. 1 p. 25-26.

F113. With respect to the medication given during the May 1990 competency trial, and the issue of whether or not Applicant was administered Triavil during the competency trial, Gripon testified that either scenario should be adopted. EHSOF Vol. 1 p. 27.

F114. Gripon opined that based upon his review of the records it appeared that Applicant was being treated "predominantly, if not totally" for "mild, situational anxiety." EHSOF Vol. 1 p. 31. Gripon noted that the symptoms noted in the medical records were mild and the "dosage of the medication given would certainly have not been adequate to have treated anything substantial in the mental health field." EHSOF Vol. 1 p. 31-32.

F115. Gripon testified that the records did not reflect that symptoms were observed although Applicant reported to have difficulty sleeping, to be anxious and to be under a great deal of stress because of his situation.

Gripon thought the medication was prescribed to offset those symptoms. EHSOF Vol. 1 p. 32.

F116. When questioned concerning side effects of Triavil, Gripon noted that potential side effects include "dry mouth, blurred vision, constipation and urinary retention." EHSOF Vol. 1 p. 38. Gripon added that the majority of people do not experience side effects particularly when the medication is given in small dosage. EHSOF Vol. 1 p. 38. Gripon agreed that Tardive Dyskinesia, a permanent neurological disorder, had been associated with Triavil and antipsychotics. He added that it was rarely reported with Triavil and was more associated with high dosages. EHSOF Vol. 1 p. 39.

F117. With respect to a possible cessation or interruption of Triavil during the competency trial, Gripon testified that, given the low doses Applicant was taking, he would not expect anything to happen although there could potentially be a recurrence of whatever symptoms the medication was administered to treat. For example, Gripon explained that if the person was initially having difficulty sleeping the person might not sleep well or if the person had been anxious, the anxiety could return. EHSOF Vol. 1 p. 44.

F118. When questioned about the Cogentin, Gripon explained that the drug was sometimes given prophylactically to offset potential side effects. Gripon testified that the records did not reflect that Applicant ever experienced side effects associated with Triavil. EHSOF Vol. 1 p. 48-49.

F119. On direct examination by the State, Gripon later testified that the medical records did not support the

proposition that Applicant had any obvious psychiatric or mental disorder and added that "I don't think this man has ever been significantly, as far as his record is concerned, mentally ill." EHSOF Vol. 2 p. 216-17.

F120. Gripon testified that he felt that the Applicant's TDCJ medical diagnosis was entirely consistent with the jury's finding of competency. EHSOF Vol. 2 p. 219.

F121. Gripon added that there was no consistent support in the records for the suggestion that Applicant suffered psychosis, paranoia or schizophrenia. EHSOF Vol. 2 p. 219-20.

F122. With respect to the possibility that Applicant experienced any side effects as a consequence of the April 2, 1990 adjustment to his prescription, Gripon described the possibility as "very remote." EHSOF Vol. 2 p. 227. Gripon could find no indication in the medical records that Applicant experienced any side effects as a consequence of the April 2, 1990 prescription. EHSOF Vol. 2 p. 228.

F123. With respect to the question of whether Applicant was or was not administered Triavil during the competency trial, Gripon testified that if Applicant was not administered the medication there should not have been any serious consequence given "the dosage he was being prescribed and the minimal symptoms for which it was being given. EHSOF Vol. 2 p. 232-333.

F124. Gripon further noted that the records did not reflect any complaints by Applicant of not getting his

medication during the competency trial. EHSOF Vol. 2 p. 233.

F125. When asked if he would have any concern over Applicant's competency to stand trial assuming Applicant was not being given Triavil, Gripon replied "absolutely none." EHSOF Vol. 2 p. 234.

F126. Gripon also found it noteworthy that Applicant was examined by defense psychologist Dr. Randall Price and was subjected to the EEG at UTMB Galveston during the week of the competency trial. EHSOF Vol. 2 p. 239-241.

F127. Applicant called Dr. Jonathan Lipman ("Lipman"), a neuropharmacologist from Chicago, Illinois as an expert. EHSOF Vol. 1 p. 112. Lipman testified that he received a Ph.D. in Pharmacology from the University of Wales. EHSOF Vol. 1 p. 113. Lipman stated that he is Board Certified as a Forensic Examiner, in Forensic Medicine, Psychopharmacology and Substance Abuse. EHSOF Vol. 1 p. 113-14. Lipman stated that Neuropharmacology is the study of the effects of drugs on the body and behavior. EHSOF Vol. 1 p. 114. On voir dire by the State, Lipman acknowledged that he is not a medical doctor and could not prescribe medicine. EHSOF Vol. 1 p. 120. Lipman testified that his primary area of expertise in neuropharmacology is in the area of chronic pain and addictive drugs. EHSOF Vol. 1 p. 121. Lipman testified that he had not specifically designed research or published research in the area of trycyclic psychiatric medications.EHSOF Vol. 1 p. 122. Over objection by the State, the Court permitted Lipman to testify. EHSOF Vol. 1 p. 124-25.

F128. Like Gripon, Lipman had also reviewed Applicant's medical records. EHSOF Vol. 1 p. 117.

F129. Lipman explained that Triavil had a antidepressant and antipsychotic component. EHSOF Vol. 1 p. 117.

F130. Lipman testified that he believed that Applicant was prescribed Triavil for "depression with some psychotic features." EHSOF Vol. 1 p. 130.

F131. Lipman recognized that the doses of Triavil administered to Applicant were low doses. EHSOF Vol. 1 p. 132.

F132. Lipman testified that if the medication were interrupted there would by an "interruption of the therapeutic advantage" and that the underlying conditions could return. In the case of larger doses, Lipman testified that some people could experience of "rebound" effect where the condition comes back stronger. EHSOF Vol. 1 p. 135. Lipman indicated that sleep problems are expected. EHSOF Vol. 1 p. 136.

F133. Lipman testified that the withdrawal could "possibly" affect Applicant's thought processes and ability to communicate with his counsel. EHSOF Vol. 1 p. 137.

F134. On cross-examination, Lipman conceded that Applicant was examined by defense expert Dr. Randall Price on May 8, 1990 during the week of the competency trial.

F135. Although Lipman had previously characterized Applicant as "developmentally brain damaged, mentally retarded, suffering from major clinical depression, hallucinations and psychosis" Lipman recognized

that on June 6, 1990 the TDCJ diagnosis did not include any psychiatric condition and reflected only mild mental retardation and antisocial personality. EHSOF Vol. 1 p. 149-50.

F136. Lipman further conceded that a June 29, 1990 EEG did not reveal any abnormal characteristics of Applicant's brain, a June 29, 1990 MRI of Applicant's brain also revealed no abnormalities and that a CAT scan also reflected no abnormalities. EHSOF Vol. 1 p. 152-54.

F137. When questioned about his diagnosis of Applicant's major clinical depression, Lipman could only point to a single medical chart entry to support such a diagnosis. EHSOF Vol. 1 p. 155.

F138. When questioned about the diagnosis of paranoia and psychosis, Lipman testified that there was a reference in the record to Applicant believing the guards were talking about him or threatening him. EHSOF Vol. 1 p. 155. Lipman conceded it was possible that guards were actually talking about the Applicant. EHSOF Vol. 1 p. 156.

F139. When questioned about the diagnosis of hallucinations, Lipman could only point to a single chart entry, on February 5, 1990 referencing Applicant having heard voices several years before while on Elavil. EHSOF Vol. 1 p. 156.

F140. Lipman could reference no other objective indications in the medical records of psychosis on Applicant's part. EHSOF Vol. 1 p. 156.

F141. Lipman added that it was his "understanding" that such paranoid thoughts or hallucinations were "secondary to depression." EHSOF Vol. 1 p. 157.

F142. With respect to the April 2, 1990 prescription change, Lipman stated that the principal motivation for the change appeared to be to help the Applicant sleep. EHSOF Vol. 1 p. 162-63.

F143. As previously noted, Lipman acknowledged that the Triavil doses administered to Applicant were less than the recommended maintenance dosage as provided in the Physician's Desk Reference. EHSOF Vol. 1 p. 164. Lipman conceded that the amount of perphenazine prescribed was extremely insignificant in terms of treatment of psychosis. EHSOF Vol. 1 p. 164.

F144. When asked if he believed that the April 2, 1990 prescription change affected Applicant's competency to stand trial Lipman stated: "No." EHSOF Vol. 1 p. 165.

F145. When asked if the record reflected that Applicant experienced side effects as a consequence of the April 2, 1990 prescription, Lipman responded "No." EHSOF Vol. 1 p. 169.

F146. Lipman acknowledged instances in the medical records which indicated Applicant playing basketball on April 23 and in July. EHSOF Vol. 1 p. 170. Lipman added that Applicant "seemed to be responding nicely" to the medication. EHSOF Vol. 1 p. 170.

F147. Lipman acknowledged that there was no evidence in the record that Applicant had ever been forcibly administered medication. EHSOF Vol. 1 p. 171.

F148. When questioned about the possibility that Applicant was not administered Triavil during the competency trial, Lipman conceded that the medical records

did not reflect the recurrence of any underlying symptoms the medication was given to treat. EHSOF Vol. 1 p. 178-79.

F149. Lipman agreed that there were no objective signs in the records that Applicant experienced any withdrawal symptoms during the week of the competency trial. EHSOF Vol. 1 p. 180.

F150. Following the July 3, 1990 evidentiary hearing, the Applicant was given the opportunity to depose former TDCJ psychiatrist Santiago Caberto ("Caberto") of Florida. Dr. Caberto was deposed by the parties on July 14, 1997.

F151. Caberto testified that he worked for TDCJ as a psychiatrist from 1982 through 1991. Deposition of Santiago Caberto at p. 8-9. At the time of the deposition Caberto testified that he was 72 years old, had recently been diagnosed with prostatic cancer and his memory was failing. Deposition of Santiago Caberto at p. 40. Caberto testified that much of his testimony concerning Applicant was based upon a reading of the medical notes. Deposition of Santiago Caberto at p. 40-41. Caberto testified that his memory of Applicant was vague. Deposition of Santiago Caberto at p. 41.

F152. During his tenure with TDCJ Caberto worked at the Ellis 1 Unit where Applicant was housed. Deposition of Santiago Caberto at p. 42.

F153. Caberto testified that Applicant's principal diagnosis was mild mental retardation with behavioral symptoms, antisocial personality disorder and hypoglycemia. Deposition of Santiago Caberto at p. 44.

F154. Caberto personally saw Applicant on April 26, 1990, June 21, 1990, July 15, 1990, September 13, 1990, October 4, 1990, October 25, 1990, November 19, 1990 and December 10, 1990. Deposition of Santiago Caberto at p. 45-46.

F155. Caberto described Applicant psychiatric diagnosis as "adjustment reaction with mixed emotional anxiety and depression." Deposition of Santiago Caberto at p. 46. Caberto stated that these were not major psychiatric concerns and were common in a prison setting. Deposition of Santiago Caberto at p. 47. When asked if the records reflected that Applicant suffered any major psychotic problems, Caberto replied that he did not observe any. Deposition of Santiago Caberto at p. 47. Caberto indicated that he saw only one reference in the records to hallucinations. Deposition of Santiago Caberto at p. 47.

F156. Caberto stated that it appeared to him that the psychiatric medications prescribed to Applicant were primarily prescribed to treat the "adjustment situation" which Caberto explained "could be mixed – anxiety and depression" and added "it's like situational problem, to adjust to that situation." Deposition of Santiago Caberto at p. 48.

F157. With respect to the April 2, 1990 prescription change, Caberto testified that he saw Applicant afterwards on April 26, 1990. Deposition of Santiago Caberto at p. 52. During the visit Applicant spoke with Cabeito concerning a possible change of venue on his case, that his lawyer was trying to get him a CAT scan, and that he was going to be seen by an outside psychologist and psychiatrist that day. Deposition of Santiago Caberto at p.

50. At the time of the visit, Caberto described Applicant as Oriented times three and Alert times three. Deposition of Santiago Caberto at p. 53. Caberto explained that he would not have used such a description for someone experiencing psychosis or significant depression.

F158. During his involvement with Applicant, Caberto testified that Applicant never experienced side effects from taking Triavil and the records did not reflect any such side effects. Deposition of Santiago Caberto at p. 57.

F159. Caberto testified that Applicant was administered low doses of Triavil. Deposition of Santiago Caberto at p. 59.

F160. Caberto stated that the Triavil doses would not have been sufficient to treat a major psychotic disorder or major depression. Deposition of Santiago Caberto at p. 59.

F161. Caberto stated that he continued the Cogentin prescription on April 26, 1990 not because he observed Applicant suffering any side effects from Triavil but rather because the prescription for Cogentin had already been written. Deposition of Santiago Caberto at p. 60.

F162. On October 4, 1990, after learning that Applicant had quit taking his medication, Caberto discontinued Applicant's prescription for Triavil and Cogentin. While the chart reflected that Applicant had quit taking his medication as early as September 30, 1990 (State's Exhibit 2 p. 8) on October 4, 1990 Caberto stated that Applicant did not appear to be experiencing a relapse of

symptoms and appeared to be handling the discontinuation of his medication quite well. Deposition of Santiago Caberto at p. 78. Caberto noted that at the time Applicant appeared "mentally, essentially the same." Deposition of Santiago Caberto at p. 77.

F163. Caberto next saw Applicant on October 25, 1990 at which time Applicant wanting his medication back because it helped him relax and was having difficulty getting to sleep. Deposition of Santiago Caberto at p. 79. Caberto testified that Applicant requested just the Triavil 4-50 and Cogentin but not the Triavil 2-10. Deposition of Santiago Caberto at p. 79. Caberto noted that Applicant had "no thought disorders" but reinstated the medication. Deposition of Santiago Caberto at p. 79. By "no thought disorders" Caberto explained that he meant that Applicant was not experiencing any psychotic disorder, disorientation, perceptual problems, hallucinations or delusional fear or paranoia. Deposition of Santiago Caberto at p. 82.

F164. Caberto testified that Applicant was fairly knowledgeable concerning the medication he was on and the benefits that it provided. Deposition of Santiago Caberto at p. 81.

F165. Caberto testified that Applicant was classified as capable of working and in fact worked in the garment factory at the Ellis I Unit. Deposition of Santiago Caberto at p. 81. With respect to Applicant's Triavil prescription, Caberto testified that it was not something that would have precluded him from working in the garment factory and that he should not have had any problem working. Deposition of Santiago Caberto at p. 81-82.

F166. Finally, Caberto testified that there was no indication in the records of Applicant ever complaining of not getting his medication as prescribed. Deposition of Santiago Caberto at p. 87.

C15. Evidence concerning the administration of Triavil, or the lack thereof, to Applicant is immaterial to the issue of Applicant's competency to stand trial. That is, even if counsel for Applicant had known at the time of Applicant's competency hearing everything he alleges was withheld from him, there is not a reasonable probability of a different outcome to Applicant's competency trial.

F167. Clearly, the evidence in this case reflects that Applicant's counsel were aware of the Triavil prescription and attempted to utilize same as evidence of the Applicant's incompetency. The jury rejected this contention.

C16. Assuming Applicant was not administered his medication as prescribed during the competency trial the court finds that any such evidence of same, under the circumstances presented, would be immaterial to the issue of Applicant's competency and would not have affected the outcome of the proceeding.

F168. Assuming Applicant was not administered his medication as prescribed during the competency trial, there is no evidence before the Court at present, nor was there evidence at the time, that Applicant ever complained of not receiving his medication or suffered any adverse reaction to any such interruption in his medication.

F169. The Court further finds noteworthy that the credible evidence in the case suggests, with respect to the claimed interruption in Applicant's medication, that in October of 1990 the medical records reflect that Applicant apparently discontinued his psychiatric medication for almost a month without adverse consequence.

C17. The Court finds that Applicant has failed to establish the materiality aspect of his *Brady* claim.

C.

FINDINGS AND CONCLUSIONS AS TO APPLICANT'S CLAIMS THAT THE STATE VIOLATED *GIGLIO V. UNITED STATES* BY ALLOWING A WITNESS TO GIVE FALSE TESTIMONY

F170. Applicant also argues that the prosecutor knowingly presented false evidence in violation of his right to due process of law. Specifically, Applicant alleges that during the competency trial, the prosecutor knowingly elicited false evidence regarding the amount and type of medication applicant was taking.

F171. Specifically, Applicant complains that on cross-examination of Dr. Mount, District Attorney Joe Price suggested before the jury that Applicant was only taking "one tablet and that is at night to sleep." Applicant's petition at paragraph 38.

F172. At the time of the cross-examination, Applicant had received the aforementioned April 2, 1990 prescription of Cogentin 1 mg twice daily and a Triavil 4-50 and 2-10 p.m.

F173. District Attorney Joe Price explains the oversight as follows:

> At the time of the competency trial, I sought to ensure that both the State and the defense had a complete set of Mr. Penry's T.D.C. medical records. In this regard, I discussed with Mr. John Wright, Penry's lead defense attorney, the possible exchange of Penry's T.D.C. records. I then requested my investigator Ron Dunnahoe to get with John Wright and exchange the medical records that the prosecution had been provided for the records previously obtained by the defense. The records obtained from the defense were much more detailed and voluminous than the one's subpoenaed by the state previously from T.D.C.
>
> * * *
>
> From the medical records that I had reviewed at the time it was my understanding that Mr. Penry was only being administered one psychiatric medication including an evening dose which was to help him sleep. I am now aware that Mr. Penry's medication had been adjusted approximately five weeks before the competency trial but I do not believe that I was aware of that prescription change at the time of the competency trial. Any mistake that I made in this regard was not intentional but was likely attributable to the fact that the state did not have a comprehensive set of Mr. Penry's T.D.C. medical records until the time of the competency trial as previously noted.

Exhibit "B" to State's Answer.

C18. To obtain relief on his claim that the State knowingly presented false evidence, Applicant bears the burden of proving that (1) the State presented false testimony, (2) the false testimony was material, and (3) the prosecution offered the testimony knowing it to be false. *Giglio v. United States*, 405 U.S. 150, 153-54, 92 S. Ct. 763, 766 (1963); *Carter v. Johnson*, ___ F.3d ___, 1997 WL 169401 *3 (5th Cir. (Tex.) April 9, 1997); *Blackmon v. Scott*, 22 F.3d 560, 565 (5th Cir. 1994); *Schlang v. Heard*, 691 F.2d 796, 799 (5th Cir. 1982), *appeal dism'd, cert. denied*, 461 U.S. 951, 103 S. Ct. 2419 (1983); *United States v. Brown*, 634 F.2d 819, 827 (5th Cir. 1981). False evidence is "material" only when it is such that it could have reasonably affected the verdict. *See Giglio*, 405 U.S. at 154, 92 S. Ct. at 766; *May v. Collins*, 955 F.2d 299, 315 (5th Cir.), *cert. denied*, 504 U.S. 901, 112 S. Ct. 1925 (1992). Regarding the prosecution's knowledge of the falsity of the evidence,

> due process is not implicated by the prosecution's introduction or allowance of false or perjured testimony unless the prosecution actually knows or believes the testimony to be false or perjured; it is not enough that the testimony is challenged by another witness or is inconsistent with prior statements.

United States v. Sutherland, 656 F.2d 1181, 1203 (5th Cir. 1981) (quoting *United States v. Brown*, 634 F.2d at 827). *See also Smith v. Black*, 904 F.2d 950, 961 (5th Cir. 1990).

F174.The Court finds although the testimony elicited from Dr. Mount was inconsistent with the April 2, 1990 prescription in that Applicant was receiving two Triavil pills (the 4-50 and the 2-10), rather than just one, plus the 1mg Cogentin twice daily, the undisputed testimony from

Gripon, Lipman and Caberto is that the doses prescribed Applicant were minimal doses and were, in large part, prescribed to assist Applicant with sleeping.

F175. The Court further finds that Applicant has failed to demonstrate that the attorney for the State knowingly elicited from Applicant's witness, Dr. Mount, inaccurate evidence concerning the amount and type of medication Applicant was receiving. Dr. Mount was adverse to the State, and he was in possession of, and had reviewed, the records about which he was questioned. The State's attorney could not have expected that Dr. Mount would testify inaccurately regarding the records reviewed by Dr. Mount.

C19. Because Applicant has failed to demonstrate that the attorney for the State knowingly procured false evidence, Applicant's claim that he was denied due process of law as a result of the inaccuracy of the evidence adduced by the State's attorney must be denied.

C20. Having previously found that evidence concerning Applicant's psychiatric medication was immaterial to the outcome of the competency trial, the Court finds that any discrepancy between the testimony elicited from Dr. Mount and the April 2, 1990 prescription was minimal and immaterial to the issue of Applicant's competency and the outcome of the trial.

F176. To the extent that the testimony of Dr. Mount was false, the Court finds no evidence that the attorney for the State procured the testimony knowing that it was false.

C21. The Court finds that Applicant has failed to establish his *Giglio* claim.

D.

FINDINGS AND CONCLUSIONS AS TO APPLICANT'S CLAIM THAT CHANGES TO HIS PSYCHIATRIC MEDICATION VIOLATED APPLICANT'S RIGHTS UNDER *RIGGINS V. NEVADA*, 504 U.S. 127, 112 S.CT. 1810 (1992).

F177. With respect to his psychiatric medication, Applicant next argues that the changes to, and claimed interruptions in, his psychiatric medication violated the dictates of *Riggins v. Nevada*, 504 U.S. 127, 112 S.Ct. 1810 (1992).

F178. In *Riggins*, the United States Supreme Court held that the defendant's due process rights were violated where, over the defendant's objection, and without a trial court finding that the forced administration of antipsychotic medication was necessary, the defendant was involuntarily administered antipsychotic medication during his trial. 112 S.Ct. at 1817.

C22. The Court finds that the instant case is distinguishable from and not controlled by *Riggins*.

F179. In *Riggins*, the defense filed a motion with the District Court seeking an order suspending the administration of Melleril and Dilantin until the end of Riggins' trial. 112 S. Ct. at 1812.

F180. In the instant case, not only did Applicant not object to the administration of Triavil to Applicant but Applicant's counsel knew that Applicant was prescribed

Triavil and Cogentin and introduced testimony concerning Applicant's psychiatric medication as evidence in support of Applicant's claim of incompetence.

F181. In *Riggins*, the defendant testified. 112 S.Ct. at 1813.

F182. In the instant case Applicant did not testify.

F183. In *Riggins*, the administration of the medication was involuntary.

F184. In the instant case, the administration of medication to Applicant was voluntary.

F185. In *Riggins*, the Supreme Court noted that the "record in this case narrowly defines the issues before us." 112 S.Ct. at 1814.

C23. In *Ex Parte Thomas*, 906 S.W.2d 22 (Tex.Crim.App. 1995), the Texas Court of Criminal Appeals construed *Riggins* to be limited to the specific facts of that case and held that the applicant failed to state a claim of denial of due process where the applicant was found not to have objected to the administration of antipsychotic medication. 906 S.W.2d at 24-25. The Court stated:

> [A]pplicant fails to show anywhere in the record that he was forced to take the medication or that there was even an objection to his being medicated at trial. Since the record does not demonstrate that the applicant's treatment with antipsychotic drugs was involuntary, *Riggins* is inapplicable and applicant's due process contention is without merit.

906 S.W.2d at 24. The Court added "it is clear that the trial strategy of the defense was to use appellant's medication to their advantage." 906 S.W.2d at 25.

C24. The instant case is controlled by *Ex Parte Thomas*. Applicant did not object to the administration of Triavil or Cogentin and his *Riggins* claim is without merit.

C25. To the extent that Applicant argues that the claimed interruption of his medication implicates *Riggins*, the Court also finds this claim unmeritorious.

F186. Applicant has presented no evidence to the Court that he was denied his medication during the capital murder trial.

F187. At the core of *Riggins* was the argument that the forced administration of Mellaril on the defendant, who was asserting an insanity defense, possibly impacted Riggins' appearance, the content of his testimony, his ability to follow the proceedings and the substance of his communication with counsel. 112 S.Ct. at 1816.

F188. In the instant case, the Court cannot conclude that any interruption in Applicant's medication presented similar concerns at his *competency* trial where, by its very nature, Applicant's counsel were seeking to have the jury find Applicant incompetent. Applicant's expert Lipman testified that Applicant's thought processes, ability to communicate with his counsel, and his ability to understand the proceedings might have been affected. EHSOF Vol. 1 p. 137. Such are elements that Applicant is required to prove to establish incompetence.

C26. The essence of Applicant's argument in this regard is that the claimed interruption of his medication

rendered him incompetent to participate in his competency trial. Such an argument is disingenuous. Assuming Applicant was not administered his Triavil, the Court finds that same would have, if anything, worked to his advantage in the competency trial.

C27. The Court finds that Applicant's *Riggins* claim is without merit.

II.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO COUNT II OF APPLICANT'S PETITION FOR A POST-CONVICTION WRIT OF HABEAS CORPUS

F189. Applicant claims in his second ground for relief that the sentencing instructions and special issues prevented the jury from giving ' "independent mitigating weight' to evidence showing diminished moral culpability and mitigating aspects of his character and record" and that the trial court erred in failing to give his requested instructions. Petition at 19. Applicant further contends that the failure to give his requested instructions violated his eighth and fourteenth amendment rights. This claim was raised and rejected on direct appeal. *Penry*, 903 S.W.2d at 764-65.

C28. Because the claim raised in Applicant's second ground for relief was raised and rejected on direct appeal, the Court need not address his claim in this proceeding. *Ex parte Acosta*, 672 S.W.2d at 472.

III.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO COUNT III OF APPLICANT'S PETITION FOR A POST-CONVICTION WRIT OF HABEAS CORPUS

F190. Applicant claims in his third ground for relief that his eighth and fourteenth amendment rights were violated when the trial court refused to allow him to introduce a document signed by him purporting to waive his eligibility for parole if given a life sentence. This claim was raised and rejected on direct appeal. *Penry*, 903 S.W.2d at 763-64.

C29. Because the claim raised in Applicant's third ground for relief was raised and rejected on direct appeal, the Court need not address his claim in this proceeding. *Ex parte Acosta*, 672 S.W.2d at 472.

IV.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO COUNT IV OF APPLICANT'S PETITION FOR A POST-CONVICTION WRIT OF HABEAS CORPUS

F191. Applicant claims in his fourth ground for relief that his constitutional rights were violated when the trial court refused to allow him to introduce evidence of his mother's mental illness at the punishment phase of his trial. This claim was raised and rejected on direct appeal. *Penry*, 903 S.W.2d at 762.

C30. Because the claim raised in Applicant's third ground for relief was raised and rejected on direct appeal, the Court need not address his claim in this proceeding. *Ex parte Acosta*, 672 S.W.2d at 472.

V.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO COUNT V OF APPLICANT'S PETITION FOR A POST-CONVICTION WRIT OF HABEAS CORPUS

F192. Applicant claims in his fifth ground for relief that his constitutional rights were violated when the trial court refused to grant his motion for a change of venue. This claim was raised and rejected on direct appeal. *Penry*, 903 S.W.2d at 730-31.

C31. Because the claim raised in Applicant's third ground for relief was raised and rejected on direct appeal, the Court need not address his claim in this proceeding. *Ex parte Acosta*, 672 S.W.2d at 472.

VI.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO COUNT VI OF APPLICANT'S PETITION FOR A POST-CONVICTION WRIT OF HABEAS CORPUS

F193. Applicant claims in his sixth ground for relief that the hearing to determine the admissibility of his confession was "constitutionally infirm and unreliable." Petition at 32. More particularly, Applicant claims that the hearing on the admissibility of his confession was "constitutionally infirm and unreliable" because the trial court applied an incorrect standard for determining the admissibility of his confession. This claim was raised and rejected on direct appeal. *Penry*, 903 S.W.2d at 744-47.

C32. Because the claim raised in Applicant's third ground for relief was raised and rejected on direct appeal,

the Court need not address his claim in this proceeding. *Ex parte Acosta*, 672 S.W.2d at 472.

VII.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO COUNT VII OF APPLICANT'S PETITION FOR A POST-CONVICTION WRIT OF HABEAS CORPUS

F194. Applicant claims in his seventh ground for relief that the time taken to decide his appeals has rendered his death sentence cruel and unusual in violation of the Eighth and Fourteenth Amendments of the United States Constitution and Article I, Sections 13 and 19 of the Texas Constitution.

F195. Applicant has not been confined for a lengthy period with the *certainty* that the State would execute. The time spent since Applicant was charged with the offense for which he is presently under a sentence of death has been due to protecting Applicant's constitutional rights and providing conscientious review of his many challenges to his conviction and sentence.

F196. The State has not unreasonably delayed imposing Applicant's death sentence.

F197. The State of Texas, as in Montana, has not "set up a scheme to prolong the period of incarceration, or rescheduled the execution repeatedly in order to torture" Applicant. *McKenzie v. Day*, 57 F.3d at 1466 (panel opinion).

F198. Applicant does not allege, much less demonstrate, that his execution at this time would be any more

or less severe than if it had been imposed shortly after the death sentence was assessed.

F199. Applicant complained for the first time about the length of time taken to resolve his legal challenges to his conviction and sentence in his application for habeas corpus relief, filed April 21, 1997.

C33. Applicant's claim that the extended period between sentencing and execution constitutes cruel and unusual punishment fails to state a constitutional violation. *See, e.g., Lackey v. Johnson*, 83 F.3d 116 (5th Cir.) (inordinate delay in carrying out an execution does not violate the prisoner's Eighth Amendment rights), *cert. denied*, 117 S.Ct. 276 (1996); *White v. Johnson*, 79 F.3d 432 (5th Cir.) (rejecting claim that seventeen-year period between sentencing and execution constitutes cruel and unusual punishment), *cert. denied*, 117 S.Ct. 275 (1996); *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir.) ("We conclude that Appellant has failed to show that executing him after fifteen years on death row, during which he faced at least seven execution dates, would constitute cruel and unusual punishment.") *cert. denied*, 115 S.Ct. 2640 (1995); *McKenzie v. Day*, 57 F.3d 1493, 1494 (9th Cir.) (en banc) ("We thus decline to recognize Richmond's lengthy incarceration on death row during the pendency of his appeals as substantively and independently violative of the Constitution." (citation omitted)), *cert. denied*, 1.15 S.Ct. 1840 (1995); *Free v. Peters*, 50 F.3d 1362 (7th Cir.) (rejecting claim that execution after approximately two decades of appellate and collateral review of death sentence constitutes cruel and unusual punishment), *cert. denied*, 115 S.Ct. 1397. *See also Rooney v. North Dakota*, 196 U.S. 319 (1905) (holding *Ex Post Facto* clause not violated

where time between sentencing and execution extended, because extension of time "was clearly to [defendant's] advantage.").

C34. In order to demonstrate a violation of the constitutional prohibition of cruel and unusual punishment the Applicant must satisfy one of the two tests articulated by the Supreme Court in *Stanford v. Kentucky*, 492 U.S. 361 (1989). Specifically, applicant may demonstrate a violation of the Eighth Amendment only if (1) it would have " 'been considered cruel and unusual at the time the Bill of Rights was adopted,' " *Stanford v. Kentucky*, 492 U.S. at 368, *quoting Ford v. Wainwright*, 477 U.S. 399, 405 (1986), or (2) it offends " 'the evolving standards of decency that mark the progress of a maturing society.' " *Stanford v. Kentucky*, 492 US. At 369, *quoting Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion).

C35. Applicant's claim inappropriately intermingles the two separate standards articulated in *Stanford*. Specifically, Applicant may not avail himself of the procedures that mark the evolving standards of decency that adhere to capital sentencing in the twentieth century and then complain that proceeding to execution would have been considered cruel and unusual at the time of the Bill of Rights was enacted, because the limited procedures available at the time the Bill of Rights was enacted were satisfied in a shorter time period.

C36. Because neither incarceration or imprisonment alone constitute cruel and unusual punishment, Applicant's claim must be that incarceration and execution in combination are disproportionate punishment for his crime.

C37. Applicant may not support his proportionality argument with the attitudes of eighteenth-century writers regarding crime and punishment. Proportionality is purely an issue of the second Stanford test and must be addressed in the context of contemporary standards. *See, e.g., Harmelin v. Michigan*, 501 U.S. 957, 961-64 (199 1) (Scalia, j., writing for plurality) (suggesting proportionality review itself is purely a contemporary practice); Id. at 997-1000 (1991) (Kennedy, J., concurring) (identifying factors relevant to proportionality review, which accounts for, *inter alia*, "differing attitudes and perceptions about local conditions"); *Coker v. Georgia*, 433 U.S. 584 (1977) (holding capital punishment disproportionate punishment for rape because, *inter alia*, in post-Furman era only three states had provided death penalty for rape.)

C38. Applicant's execution would not violate contemporary standards of decency. *See Stafford v. Ward*, 59 F.3d at 1028 (noting that no federal court has agreed that prolonged period between sentencing and execution can render unconstitutional an otherwise valid death sentence); *McKenzie v. Day*, 57 F.3d 1461, 1466 (9th Cir.) ("With all due respect to our colleagues abroad, we do not believe [the view taken by foreign jurisdictions regarding the viability of a claim that a prolonged period of time between sentencing and execution can render an otherwise valid death unconstitutionally cruel and unusual] will prevail in the United States."), *opinion adopted*, 57 F.3d 1493 (en banc), *cert. denied*, 115 S. Ct. 1840 (1995). In addition to the fact that not a single American court has recognized a constitutional violation due to an extended time period between sentencing and execution,

the actions, or lack of action, by the legislative bodies within the United States – "[t]he clearest and most reliable objective evidence of contemporary values, *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989) – demonstrates that executing Applicant after an extended period of time between sentencing and execution does not offend contemporary American values. That is, Applicant cannot demonstrate that executing him after an extended period between sentencing and execution offends contemporary American values, because no legislative body with the United States has sought to legislate the rule Applicant seeks, i.e., the rule that a death sentence must be carried out within a prescribed period of time or the otherwise valid death sentence is automatically commuted to a life sentence. *See also* USUN Press Release No. 49-(95) (March 29, 1995) (statements of officials from Clinton Administration before Human Rights Committee at the United Nations, specifically reserving rights under International Covenant on Civil and Political Rights regarding claim that extended period between sentencing and execution constitutes cruel and unusual punishment or otherwise violates International Covenant).

C39. The foreign authorities cited by Applicant do not support Applicant's claim that his execution would constitute cruel and unusual punishment. The Supreme Court has "emphasized that it is American conceptions of decency that are dispositive, rejecting the contention of petitioners and their various *amici* . . . that the sentencing practices of other countries are relevant." *Stanford v. Kentucky*, 492 U.S. at 369 n. 1.

C40. Assuming *arguendo* that the circumstances at the time the Bill of Rights was enacted inform the Eighth

Amendment issue in this case, applicant has filed to demonstrate that his execution after an extended period between sentencing and execution would have been considered cruel and unusual at the time the Bill of Rights was enacted. While pre-execution delay was unusual in the eighteenth century, Applicant does not demonstrate that it would have been considered cruel, particularly where the delay is due to appellate and collateral review of the conviction and sentence.

C41. Applicant's reliance on what contemporary English jurists claim eighteenth century English jurists might have thought do not support his claim that execution after an extended period of time between sentencing and execution would have been considered cruel and unusual. While English jurisprudence of the eighteenth century interpreting the antecedents to provisions in our Constitution may be relevant to what the framers of our Constitution intended, contemporary assessments by foreign jurisdictions of what eighteenth century English jurists might have thought are not. *See Stanford v. Kentucky*, 492 U.S. at 369 n. 1.

C42. Assuming *arguendo* that Applicant could demonstrate a constitutional right to a speedy appellate review, applicant may not rely on time spent prior to any objection being made or any notification given to the courts that he deemed delay prejudicial. The State and courts could reasonably expect that any delay was to Applicant's benefit. *See and compare Lockhart v. Fretwell*, 506-U.S. 364, 372-73 (1993) ("federal habeas petitioner has no interest in the finality of his conviction"); *Biddle v. Perovich*, 274 U.S. 480, 487 (1927) ("By common understanding imprisonment for life is a less penalty than

death."); *Rooney v. North Dakota*, 196 U.S. 319 (1905) (holding *Ex Post Facto* clause not violated where time between sentencing and execution extended, because extension of time "was clearly to [defendant's] advantage").

C43. Again, assuming *arguendo* that Applicant could establish a constitutional right to a speedy appellate review, he would not be entitled to habeas relief in the form of a commutation of his sentence or outright release from custody. Applicant's alleged constitutional violation does not call into question the validity of his sentence when rendered, and the alleged constitutional violation will not cause Applicant's subsequent execution to be any more severe than it would have been if it had been imposed shortly after sentence was assessed. *See and compare State of Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947) ("The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot . . . add an element of cruelty to a subsequent execution."); *McKenzie v. Day*, 57 F.3d at 1467 (panel opinion) ("whatever anguish McKenzie has suffered is in the past and cannot be undone"; only effect of vacating death sentence due to length to time since sentencing would be "to punish the state and perhaps speed up the rate of executions, but it would not relieve McKenzie and those in his position of the pain they have already suffered.").

VIII.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO COUNT VIII OF APPLICANT'S PETITION FOR A POST-CONVICTION WRIT OF HABEAS CORPUS

F200. In his eighth claim for relief, applicant claims that execution by lethal injection constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendment.

F201. In this regard, applicant merely reasserts unfounded claims which have been previously addressed and rejected by the courts. Applicant fails to cite a single authority that is consistent with his claim that execution by lethal injection is unconstitutional in the abstract, or as administered by the State of Texas.

F202. Applicant's concerns about execution by lethal injection can be summarized as follows:

1) TDCJ does not have detailed standards or procedures for the executioners to follow thus creating a "risk" of pain and suffering (Applicant's petition at paragraph 111);

2) TDCJ has no rules or regulations to ensure that executioners are properly trained (Applicant's petition at paragraph 112); and,

3) TDCJ has no written guidelines concerning the preparation of the drugs or the sequence in which they are to be administered (Applicant's petition at paragraph 112).

C44. Each contention has been expressly rejected by courts that have considered same.

C45. In 1978 the Texas Court of Criminal Appeals established that the Texas lethal injection method established by Article 43.14 of the Code of Criminal Procedure did not constitute cruel and unusual punishment under either the federal or state constitution. *Ex parte Granviel*, 561 S.W.2d 503, 510 (Tex.Crim.App. 1978). In *Granviel*, the Appellant argued that it could not be ascertained from the statute what substance or substances would be used in the injection. Id. In reply the State argued that the earlier execution statutes were not detailed. Id. For example, the State noted that electrocution statutes failed to specify that a chair would be used, the amount of voltage, the volume of amperage, the place of attachment of electrodes and whether AC or DC current should be used. Id. Further the earlier hanging statutes had not specified the type of gallows, the height of fall, or the type of rope or knot to use. Id. Finally, the laws relating to death by firing squad had not specified the number of executioners, the muzzle velocity of the rifles, the type of bullets or the distance of the guns to the condemned. Id. After, analyzing pertinent authorities, the Court of Criminal Appeals concluded that the failure to specify the exact substances and the procedures to be used did not render the statute unconstitutionally vague. Id. at 513.[5] In response to Appellant's claims of possible complications

[5] In reaching its decision, the Texas Court of Criminal Appeals was apprised of the fact that the decision had been made by the Department to use sodium thiopental. The Court noted the habeas hearing testimony of Dr. Gary Harold Wimbish, a toxicologist and assistant professor of Pathology that he would not have advised against the use of sodium thiopental if consulted by the TDC. 561 S.W.2d at 508.

in the administration of the lethal injection (like those of the applicant herein) the Court added:

> We conclude that the possibility, should it arise, does not make the means of inflicting death inherently cruel. Rather, it could be characterized as a possible discomfort or suffering necessary to a method of extinguishing life humanely.

561 S.W.2d at 510.

C46. In *Woolls v. McCotter*, 798 F.2d 695 (5th Cir. 1986), *cert. denied*, 478 U.S. 1031, 107 S.Ct. 15 (1986), the Fifth Circuit rejected the claim that execution by lethal injection in the State of Texas constituted cruel and unusual punishment. Id. at 698. Like Applicant in the instant case, the appellant argued that the "use by the Texas Department of Corrections of sodium thiopental- . . . when administered by untrained personnel or in improper dosages . . . may cause conscious death by suffocation." Id. The Fifth Circuit rejected the contention finding it to be "premised on supposition unsupported by fact." Id. The similarity between the arguments in *Wools* and the instant case are striking.

> The appellant proffers the affidavit of Dr. Ward Casscells, which recites an American Medical Association recommendation that a physician should not be a participant in a legally authorized execution. The appellant then offers the affidavit of Dr. Leroy David Vandam, which asserts that, even if administered by an expert, the injection of sodium thiopental may cause physical and mental pain due to possible technical difficulties in administering the drug. Finally, the appellant submits the affidavits of

> Dr. Richard S. Hodes, who concludes that, even if administered by a professional, individual responses to this drug can be quite varied. Thus if an individual is not rendered unconscious before the injection of the paralytic drug, the individual would be aware of the onset of loss of consciousness and the paralytic drug would produce a sense of shortness of breath and suffocation over a two to three minute period. Depending on the specific paralytic drug administered, the individual may also experience a sensation of multiple electric shocks over the entire body with erratic muscle twitching followed by acute paralysis and suffocation.

Id. at 696-98. The Fifth Circuit rejected the contention stating:

> First, the appellant has not even alleged, much less produced any evidence, that the Texas Department of Corrections allows anyone other than trained medical personnel to administer lethal injections. Second, the appellant has neither alleged nor produced evidence that would indicate that improper dosages of sodium thiopental have been or will be administered so as to result in physical or mental pain. Finally, even if the physical and mental manifestations noted by Dr. Hodes were experienced by an individual, this showing "of discomfort or unnecessary pain falls far short of the showing found insufficient in Gray v. Lucas [710 F.2d 1048, 1057-61 (5th Cir.), cert. denied, 463 U.S. 1237, 104 S.Ct 211, 77 L.Ed2d 1453 (1982)]."

798 F.2d at 698.

C47. The argument that lethal injection is unconstitutional if administered by an unqualified person was

reasserted in *Kelly v. Lynaugh*, 862 F.2d 1126 (5th Cir. 1988) *cert. denied*, 492 U.S. 925, 109 S.Ct. 3263 (1989). In *Kelly*, the Fifth Circuit rejected the appellant's claim of cruel and unusual punishment holding that the matter had already been resolved in *Woolls, supra*. 862 F.2d at 1135.

C48. Recent federal pronouncements are consistent with the earlier holdings maintaining the constitutionality of lethal injection. In *Hill v. Lockhart*, 791 F.Supp 1388 (E.D. Ark. 1992) the United State District Court for the Eastern District of Arkansas addressed the constitutionality of lethal injection in Arkansas and the absence of a physician at the executions. Judge Woods stated:

> The absence of a physician at an execution is hardly a deprivation of a constitutional right. It should be pointed out that no proof has been adduced that a physician was not present at the other executions mentioned by petitioner or that a physician will not be present at petitioner's execution. Petitioner seeks to implicate the federal constitutional right that to be free from cruel and unusual punishment on the basis that it is sometimes difficult to locate a vein suitable for an intravenous injection. Petitioner attempts to attribute such difficulty to the absence of a physician. However, it must be noted that even in a hospital setting intravenous injections are generally given by a nurse or other medical personnel. On the rare occasion when there is difficulty in locating a vein, more than a single needle insertion may be necessary. This is hardly cruel and unusual punishment contemplated by the Eight Amendment.

There is general agreement that lethal injection is at present the most humane type of execution

> available and is far more preferable to the sometimes barbaric means employed in the past. Many states have now abandoned other forms of execution in favor of lethal injection.

791 F.Supp. at 1394.

C49. In *LaGrand v. Lewis,* 883 F.Supp. 469 (D. Ariz. 1995) the petitioners claimed that the Arizona lethal injection procedure was constitutionally deficient for reasons similar to those asserted in the instant case. Specifically, the petitioners offered an expert affidavit seeking to establish that the Arizona three drug execution procedure was "fraught with substantial risk of pain to the condemned." Id. at 470. The expert, Dr. Palmer, reviewed the Internal Management Procedures of the Arizona prison system and concluded that there were insufficient guidelines controlling the dosage, sequence and delivery rate of the drugs. Id. The affidavit of Dr. Palmer further noted that the Procedures did not prescribe a level of training for the executioner. Id. It was asserted that "severe infliction of pain could result from repeated attempts to insert the intravenous catheter into the condemned's veins." Id. Finally, Dr. Palmer stated that "if the catheter is not inserted in a vein, the drugs would be injected into the muscle tissue, producing a much slower rate of absorption." Id.

Rejecting the petitioners' arguments, the district court held "the written procedures are not constitutionally infirm simply because they fail to specify in explicit detail the execution protocol. Petitioners' argument challenging the procedural safeguards *is based entirely on speculation.*" Id. (emphasis added). "The court therefore concludes the petitioners have not carried their

burden of showing that the challenged method exposes them to more than a negligible risk of being subjected to a cruel and wanton infliction of pain." Id. at 471.

F203. In the instant case, the factual basis of applicant's claim is as lacking as those of the petitioners in the preceding authorities.

F204. While applicant questions the adequacy of the TDCJ execution policies and procedures, Applicant fails to establish by competent evidence that any of the potential "risks" have in actual practice occurred.

F205. Moreover, Applicant has not established that the personnel employed to carry out Texas executions are, in fact, inadequately trained.[6]

F206. Finally, Applicant cannot demonstrate that the drugs used in the Texas lethal injection process are currently, or have ever been, injected in an improper sequence or dosage so as to actually result in a "botched" execution.

F207. Notably, the supporting affidavits to Applicant's petition reveal only anecdotal instances of claimed improprieties in the Texas execution process. In fact, it should be noted that in the list of so-called "botched executions" included in the Radelet and Denno, affidavits

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[6] Tex. Code of Criminal Procedure, Article 43.20 entitled "Present at Execution" includes among those that may be present during an execution "the executioner, and such persons as may be necessary to assist him in conducting the execution . . . , two physicians, including the prison physician . . . ."

(attached as Exhibits "F" and "G" respectively to applicant's petition) there is no mention of an inefficient execution in the State of Texas in the *last five years*.

C50. Regarding Applicant's concern over the possibility of multiple catheter insertions, the foregoing authorities reflect that same is simply not a matter of constitutional concern or dimension. The Court takes judicial notice that such a problem, to the extent that it can be so characterized, occurs on a daily basis in hospitals across the country.

C51. It can hardly be seriously contended that what may be essential to routine medical care in this country becomes "cruel and unusual punishment" when encountered in the execution process.

F208. Applicant makes no showing that he has been an IV drug user or suffers from any of the infirmities commonly associated with such, i.e., constricted or damaged veins.

F209. The execution information packet attached as tab 2 to the Egbert affidavit (Exhibit "E" to applicant's petition) clearly notes that "a medically trained individual (not to be identified) shall insert an intravenous catheter into the condemned person's arms and cause a saline solution to flow."

F210. Applicant fails to demonstrate a single instance where this has not in fact occurred.

C52. The fact that TDCJ does not have detailed standards or procedures for implementing a lethal injection execution does not render the execution method of lethal

injection unconstitutional. *See and compare Ex parte Granviel*, 561 S.W.2d 503 (Tex.Crim.App. 1978); *Woolls v. McCotter*, 798 F.2d 695 (5th Cir.), *cert. denied* 478 U.S. 1031 (1986); *LaGrand v. Lewis*, 883 F.Supp. 469 (D.Ariz. 1995).

C53. The absence of a physician at an execution does not render lethal injection cruel and unusual. *See, Woolls v. McCotter*, 798 F.2d 695 (5th Cir.), *cert. denied* 478 U.S. 1031 (1986); *Kelly v. Lynaugh*, 862 F.2d 1126 (5th Cir. 1988), *cert. denied*, 492 U.S. 925 (1989); *Hill v. Lockhart*, 791 F.Supp. 1388, 1394 (E.D. Ark. 1992).

C54. Applicant's conclusory allegation that there are no rules or regulations to ensure that executioners are properly trained fails to demonstrate that lethal injection executions are being administered in a manner that would constitute cruel and unusual punishment. *See and compare Kelly v. Lynaugh*, 862 F.2d 1126 (5th Cir. 1988), *cert. denied*, 492 U.S. 925 (1989); *Hill v. Lockhart*, 791 F.Supp. 1388, 1394 (E.D. Ark. 1992).

C55. The absence of written guidelines concerning the preparation of drugs or the sequence in which they are to be administered in a lethal injection execution does not render the execution cruel and unusual punishment. *See Ex parte Granviel*, 561 S.W.2d 503 (Tex.Crim.App. 1978); *Woolls v. McCotter*, 798 F.2d 695 (5th Cir.), *cert. denied* 478 U.S. 1031 (1986); *LaGrand v. Lewis*, 883 F.Supp. 469 (D.Ariz. 1995).

C56. Because Applicant has failed to make an evidentiary showing that the procedures utilized by the TDCJ are actually being employed in an unconstitutional fashion, his claim must fail as a matter of law.

IX.

FINDINGS OF FACT AND CONCLUSIONS OF LAW AS TO COUNT IX OF APPLICANT'S PETITION FOR A POST-CONVICTION WRIT OF HABEAS CORPUS

F211. Applicant claims in his ninth ground for relief that the cumulative effect of his alleged constitutional violations, even if they could be considered harmless, in the aggregate state an independent constitutional violation.

C57. Applicant's claim of cumulative error fails to state a constitutional violation under either the federal Constitution or the state Constitution.

C58. Assuming *arguendo* that Applicant has identified an independent constitutional claim based on cumulative error, Applicant has failed to establish any constitutional errors occurred that can be accumulated, and, therefore, this claim must fail. *See Derden v. McNeel*, 938 F.2d 605, 608 (5th Cir.) (recognizing claims of constitutional error *only* of claims shown to be of merit), *rehearing granted*, 947 F.2d 147 (1991); *Mullen v. Blackburn*, 808 F.2d 1143, 1147 (5th Cir. 1987) (rejecting claim of constitutional error due to failure to demonstrate any errors; "[t]wenty times zero equals zero").

ORDER

THE CLERK IS ORDERED to immediately transmit to the Court of Criminal Appeals, in accordance with Article 11.071, certified copies of the following documents:

A. Applicant Johnny Paul Penry's's Petition for a Post-Conviction Writ of Habeas Corpus and Supplement to Count I of Applicant Johnny Paul Penry's's Petition for a Post-Conviction Writ of Habeas Corpus (including all exhibits and attachments to these pleadings);

B. The State's Answer (including all exhibits and attachments to these pleadings);

C. All motions and responsive pleadings filed in this habeas corpus action;

D. All interrogatory responses filed by the parties;

E. The Court reporter's transcript and statement of facts from the motions hearing held on June 18, 1997 and the evidentiary hearing held on July 3, 1997;

F. The transcript of the deposition of Santiago Caberto held on July 14, 1997;

G. The documentary exhibits entered at the hearings and deposition;

H. The parties proposed findings of fact and conclusions of law; and

I. The Court's Findings of Fact, Conclusions of Law and Order;

THE CLERK IS FURTHER ORDERED to transmit to counsel for Applicant certified copies of the following documents, in accordance with Article 11.071:

A. All orders entered by this Court in this habeas corpus action;

B. The parties proposed findings of fact and conclusions of law; and

C. The Court's Findings of Fact, Conclusions of Law and Order.

Signed on this 23 day of Sept., 1997

/s/ Joe Ned Dean
JOE NED DEAN
258th DISTRICT COURT
STATE OF TEXAS

TEXAS COURT OF CRIMINAL APPEALS

EX PARTE JOHN PAUL PENRY — Habeas Corpus Application

NO. 15,918-02 — from POLK County

ORDER

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Article 11.071, V.A.C.C.P.

On July 17, 1990, applicant was convicted of the offense of capital murder. The jury answered the special issues submitted pursuant to Article 37.071, V.A.C.C.P., and the trial court, accordingly, set punishment at death. Applicant's conviction was affirmed on direct appeal to this Court. Penry v. State, 903 S.W.2d 715 (Tex.Cr.App.), *cert. denied*, ___U.S.___, 116 S.Ct. 480, 133 L.Ed.2d 408 (1995).

In the instant case, applicant presents ten allegations in which he challenges the validity of his conviction and resulting sentence. The trial court held an evidentiary hearing, entered findings of fact and conclusions of law, and recommended that the relief sought be denied.

This Court has reviewed the record. The trial court's findings of fact and conclusions of law are supported by the record and, upon such basis, the relief sought is denied.

IT IS SO ORDERED THIS THE 3RD DAY OF DECEMBER, 1997.

PER CURIAM

En banc

Do Not Publish

BAIRD and OVERSTREET, JJ., dissent to the decision to deny and would file and set the first allegation for submission.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHNNY PAUL PENRY, Petitioner,	§	
VS.	§	CIVIL ACTION
GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division, Respondent.	§	NO. H-97-4094

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MEMORANDUM AND ORDER

Petitioner, Johnny Paul Penry, seeks a federal writ of habeas corpus under 28 U.S.C. § 2254 vacating his state capital murder conviction and death sentence. (Docket Entry No. 18). Respondent, Gary L. Johnson, Director, Texas Department of Criminal Justice – Institutional Division, has answered and moved for summary judgment. (Docket Entry No. 20). Penry has replied to respondent's motion for summary judgment; moved to strike respondent's motion for summary judgment; and cross-moved for summary judgment on several of his claims for relief. (Docket Entry Nos. 27 and 28).

Based on a careful review of the petition, the motions, the reply, the state court records, and the applicable law, this court GRANTS respondent's motion for summary judgment; DENIES Penry's motion to strike

respondent's motion for summary judgment; and DENIES Penry's cross-motion for summary judgment. Based on these rulings, this court lifts the stay of execution, denies the petition for writ of habeas corpus, addresses the issuance of a certificate of appealability, and dismisses this case.

The reasons for these rulings are set out in detail below.

I. Procedural History

On November 7, 1979, the State of Texas indicted Penry for the capital murder of Pamela Carpenter. (Trans. Vol. 1, p. 1).[1] In 1980, after a transfer of venue on defendant's motion, and following a competency hearing, a jury tried Penry, convicted him of capital murder, and sentenced him to death. The Texas Court of Criminal Appeals affirmed Penry's conviction and sentence on direct appeal. *Penry v. State*, 691 S.W.2d 636 (Tex. Crim. App. 1985), *cert. denied sub nom., Penry v. Texas*, 106 S. Ct. 834 (1986). The Court of Criminal Appeals denied Penry's

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[1] The state court records of Penry's 1990 retrial consist of a five-volume transcript of pretrial motions, court orders, and other pleadings, cited as "Trans. Vol. ___, p. ___"; a fifty-two volume Statement of Facts, including hearings on pretrial motions, the suppression hearing, the competency hearing, the change of venue hearing, jury voir dire, the guilt/innocence proceedings, the sentencing proceedings, and the hearing on Penry's motion for new trial, cited as "S.F. Vol. ___, p. ___" and a four-volume transcript of the state habeas proceedings, cited as "S.H. Vol ___, p. ___." The parties have also submitted the Statement of Facts from Penry's 1980 suppression hearing and his 1980 trial.

application for state habeas relief on May 5, 1986. The Eastern District of Texas and the Fifth Circuit denied Penry's federal petition for a writ of habeas corpus. *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987).

In 1989, the United States Supreme Court granted Penry's petition for habeas relief, ruling that the jury instructions in the sentencing phase of his trial did not allow the jury to consider and give effect to the mitigating evidence of Penry's mental retardation and history of childhood abuse. *Penry v. Lynaugh*, 109 S. Ct. 2934 (1989) ("*Penry* I"). The Supreme Court held that the sentencing instructions deprived the jury of a "vehicle for expressing its 'reasoned moral response' " to the mitigating evidence Penry presented. *Id.* at 2952. Concluding that the sentence imposed did not result from the individualized determination required by "the fundamental respect for humanity underlying the Eighth Amendment," the Supreme Court vacated the conviction and sentence and remanded the case. *Id.* at 2945 (quoting *Woodson v. North Carolina*, 96 S. Ct. 2978, 2991 (1976)).

After a second competency hearing, the State of Texas retried Penry for capital murder ("*Penry* II").[2] The jury found Penry guilty of capital murder on July 9, 1990, and sentenced him to death on July 17, 1990. The Texas

[2] The case was remanded to Trinity County, Texas, the location of Penry's first trial. The trial judge changed venue to Polk County, Texas, where Penry's indictment had issued. The trial court granted Penry's motion for a change from that venue, moving the trial to Walker County, Texas, but denied a subsequent motion to change venue. Penry's second trial took place in Walker County.

Court of Criminal Appeals affirmed Penry's conviction and sentence on direct appeal. *Penry v. State*, 903 S.W.2d 715 (Tex. Crim. App.), *cert. denied sub nom., Penry v. Texas*, 116 S. Ct. 480 (1995). On October 17, 1996, Penry filed an application for state habeas relief. On July 3, 1997, the state district court held an evidentiary hearing on three of Penry's claims. On September 23, 1997, the state district court denied Penry's habeas application. On December 3, 1997, the Texas Court of Criminal Appeals denied the habeas application, adopting the district court's recommendation.

On December 9, 1997, the state district court scheduled Penry's execution for May 13, 1998. On March 2, 1998, Penry filed a federal petition for writ of habeas corpus in this court. Penry asserts the following claims for relief:

I. The trial court failed to give the jury a vehicle for considering mitigating evidence concerning Penry's childhood abuse and mental retardation.

II. Penry's execution would violate his right to be free from cruel and unusual punishment because Penry is mentally retarded.

III. Penry's execution would violate the Eighth Amendment because there currently exists a national consensus against the execution of the mentally retarded.

IV. The trial court violated *Simmons v. South Carolina* by refusing to admit Penry's evidence regarding the unlikelihood of parole yet permitting the prosecutor to argue Penry's future dangerousness.

V. The trial court violated Penry's rights under *Estelle v. Smith* by admitting evidence derived from involuntary psychiatric examinations.

VI. The trial court violated Penry's constitutional rights by excluding evidence of Penry's mother's mental illness.

VII. The State violated Penry's constitutional rights by failing to administer his antipsychotic medication during the competency hearing and by failing to correct inaccurate testimony regarding the nature and purpose of the medication.

VIII. Penry's execution after eighteen years on death row would violate his constitutional rights under the Eighth Amendment.

IX. Penry's *Miranda* rights were violated, rendering his confessions illegal and improperly admitted at trial.

X. The trial court violated Penry's rights under the Sixth and Fourteenth Amendments by refusing to change venue from Walker County.

XI. Penry's constitutional rights were violated by the prosecution's misstatement of the law during voir dire.

XII. The trial court's jury charge during the punishment stage violated Penry's constitutional rights.

XIII. Penry's competency hearing was constitutionally inadequate.

XIV. The trial court's admission of irrelevant hearsay evidence violated Penry's Fifth and Sixth Amendment rights.

XV. Texas's clemency procedures violate Penry's substantive and due process rights under the Fourteenth Amendment and, therefore, violate Penry's rights under the Eighth Amendment.

On April 20, 1998, this court granted Penry's motion for a stay of his execution for the limited purpose of permitting full consideration of Penry's claims. Each of Penry's claims is addressed below.

II. Factual Background: The Record of *Penry* I and *Penry* II

On October 25, 1979, Pamela Carpenter telephoned a friend, Cynthia Peters, and told her friend that she had been raped and stabbed.[3] Peters drove to Carpenter's house in Livingston, Texas and found Carpenter, still alive, lying on a bed in her bedroom. Peters called the police.

Officer E.G. Paige of the Livingston Police Department arrived at Carpenter's house and talked to her. Carpenter did not know the identity of her attacker, but gave a description of a white male with black, curly hair, cut over the ears; slender and short; wearing a "reddish plaid shirt" with a "flowery design" and blue jeans. (S.F.

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[3] The factual background, largely undisputed, is drawn from the prosecution's case-in-chief during the guilt/innocence phase of *Penry* II.

Vol. 42, p. 174). Officer Paige noticed a pair of scissors and a pocketknife on the floor in front of Carpenter's bed.

Carpenter was taken to the hospital, where she again described the attacker in similar terms. Carpenter also stated that she did not know the attacker personally but had "seen him in the area." (S.F. Vol. 43, p. 264). Carpenter died at the hospital a short time later.

Billy Ray Nelson, a Polk County deputy sheriff, had heard a police radio report of the attack and a description of the attacker. Nelson thought the description matched Penry, whom he knew. Nelson drove to Penry's father's house in Livingston, Texas. Penry answered the door, wearing blue jeans without a shirt. Nelson told Penry briefly about the attack on Carpenter and asked Penry to come with him to the police station. Penry put on a shirt and Nelson drove him to the Livingston police station in the police car.

When Penry got out of the car at the station, Nelson and another officer in the car noticed blood soaking through the back of Penry's shirt. The officers asked Penry about the blood. Penry took off his shirt and showed the officers two puncture wounds below his right shoulder. Penry told the officers that he had received the wounds that morning when he had fallen off his bicycle and landed on a stick. Penry's shirt did not have holes in it, but Penry told the officers that the shirt he had been wearing when he was injured was at his father's house.

The officers obtained Penry's consent to search his father's house for the shirt and drove Penry back to the house. Penry entered the house, located the shirt, and

gave it and an undershirt to the officers. The shirt and undershirt were later determined to be torn in the location corresponding to Penry's puncture wounds. Both shirts had a blood stain around the tear.

The officers asked Penry to accompany them to the Carpenter home. Penry agreed. At the Carpenter home, Penry remained in Nelson's patrol car. While waiting in the patrol car, and not in response to any question, Penry told Nelson three times that he did not commit the crime. After they had been at the Carpenter home for approximately forty-five minutes, Penry told Nelson "that he wanted to get it off of his conscience." (S.F. Vol 43, p. 303). Nelson, believing Penry was to going to reiterate his innocence, told Penry to "be quiet." (*Id.*) Penry then said that he had "done it." (*Id.*, p. 304).

The officers brought Penry into the Carpenter home. Penry "point[ed] out things" before they reached the house and told Nelson "about the door that he had entered." (*Id.*, p. 305). Inside the house, Penry "explained everything in detail." (*Id.*, p. 306).

The officers drove Penry back to the Livingston police station. Penry was taken before Justice of the Peace Garnet Galloway, who read Penry his magistrate warnings, which are similar to *Miranda* warnings. Before Penry signed the warnings, Penry's father entered the courtroom and read Penry his *Miranda* rights. (1980 S.F. Vol. 4, pp. 184, 204-07). Penry's father then asked Penry if he had committed the crime. Penry answered "yes."

Penry gave a written confession that afternoon and a second written confession the next day, both in narrative form. In the confessions, Penry stated that he had first

met Carpenter three weeks earlier when he had helped "a guy named Harold" move some heavy appliances into Carpenter's home. Penry stated that he returned to Carpenter's home on October 25th, entered the house, and threatened Carpenter with his pocketknife. Carpenter fought with Penry, knocking the pocketknife out of Penry's hand and stabbing Penry in the back with a pair of scissors. Penry described subduing Carpenter, kicking and "stomping her," raping her, and stabbing her with the scissors. (1990 Jury Trial; State's Exhibit No. 48-A, p. 3). Penry then returned to his father's house.

At the trial, the State presented testimony from Harold Stubblefield. On October 9, 1979, Stubblefield had hired Penry to help install a freezer and stove in Carpenter's home. Stubblefield testified that Carpenter was present when he and Penry installed the appliances. The State also presented testimony from a forensic pathologist that the puncture wounds in Penry's back were consistent with wounds that could have been caused by the scissors found in Carpenter's home. The forensic pathologist also testified that a large bruise on Carpenter's chest was consistent with an injury that could have been caused by a pair of boots obtained from Penry.

In his defense, Penry presented medical records documenting his mental retardation,[4] possible organic brain

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[4] In *Penry* I, the Supreme Court described the mitigating evidence of mental retardation that Penry had presented to the jury during the sentencing phase of his first trial. The Court noted the evidence of mental retardation:

damage, and evidence he described as showing his desire to please authority figures. Penry also presented testimony from one of the officers that picked up Penry at his father's house on October 25, 1979. That officer testified that Penry put on shoes, rather than boots, when they left to go to the police station. Penry concluded with the testimony of Dr. Roberto Bayardo, a forensic pathologist. Dr. Bayardo testified that Penry's boots were unlikely to have caused the bruise on Carpenter's chest.

The State offered Dr. Fred Fason as a rebuttal witness. Dr. Fason testified that Penry had an antisocial personality, a factor that could lower the scores Penry obtained on IQ tests. Dr. Fason testified that such a personality would cause Penry to rebel against, rather than submit to, authority. Dr. Fason testified that he believed

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- As a child, Penry was diagnosed as having organic brain damage.
- Penry scored between 50 and 63 on IQ tests taken at different times, indicating "mild" or "moderate" mental retardation.
- Penry was evaluated as having the "mental age" of a 6-1/2 year old.
- Penry's "social maturity" was that of a 9 or 10 year old.
- Penry's mother, Shirley Penry, testified that Penry "was unable to learn in school and never finished the first grade."
- Penry was "in and out of a number of state schools and hospitals" until he was twelve years old, when he stopped attending school.
- Penry's aunt "struggled for over a year to teach Penry how to print his name."

Penry I, 109 S. Ct. at 2941-42.

Penry did not have significant brain damage or mental retardation; Penry possessed the intellectual capacity to understand *Miranda* warnings and to waive those warnings in a knowing and intelligent manner; and Penry had the capacity to act intentionally.

During the sentencing phase of the retrial, the prosecution offered testimony from five prison guards and a deputy sheriff that Penry demonstrated aggressive and dangerous behavior in prison and while in custody during his first trial in 1980. The prosecution also offered testimony from Maurice Cook, the Texas Ranger who took Penry's second confession; from a woman mentioned in Penry's second confession as someone he had wanted to rape; and from a woman Penry was convicted of raping in 1977.

Penry presented Dr. Randall Price, a clinical neuropsychologist, who testified that he believed Penry suffered from organic brain impairment and mental retardation. Dr. Price testified that organic brain impairment can reduce the ability to control behavior and impulses. One of Penry's childhood teachers testified that Penry was retarded and did not fake his retardation. Penry also presented additional medical records regarding his brain damage, mental retardation, and behavioral problems throughout his childhood and adolescence.

Several of Penry's relatives and childhood neighbors testified to Penry's childhood abuse. This evidence included testimony by Penry's sisters, Belinda Anderson and Trudy Ross; Penry's aunts, Lucille Anderson, Marilyn Barnet, and Patsy Ross; and Penry's neighbors,

Carolyn Ward and Billie Johnson. The jury heard the following testimony:

- When Penry was ten months old, Penry's mother, Shirley Penry, "sock[ed]" Penry "right in the mouth" when he was sitting in his highchair. (1990 S.F. Vol. 48, p. 1165).

- When Penry was older, Shirley Penry beat her son almost every day, using belt buckles, belts, brooms, toy brooms, sticks, mop sticks, switches, and her fists. Shirley Penry would "stomp on" Penry, try to "claw[ ]" Penry, threaten to "scratch his little eyeballs out," hit Penry in the head with a shoe, put cigarettes out on Penry's skin, hold Penry's head under water, and make Penry stand in front of a heater until his legs blistered. (*Id.*, pp. 1086, 1088, 1113-15, 1264). When Penry was four years old, Shirley Penry placed him in boiling water that caused scarring from his waist down. (*Id.*, pp. 1125, 1261-62). Shirley Penry "[stood] there" as Penry screamed. (*Id.*, p. 1125).

- Shirley Penry would lock Penry in his room for up to twelve to fourteen hours without food or water, and sometimes for days at a time. (*Id.*, pp. 1083, 1116). When Penry was forced to defecate in his room or the attic, Shirley Penry would beat him. (*Id.*, pp. 1262-63, 1271). On occasion, Shirley Penry forced Penry to drink his own urine and to eat his own feces. (*Id.*, pp. 1089-91, 1115-16).

- Neighbors heard "terrified screams, pleading screams" coming from the Penry household. (*Id.*, p. 1249).

- Shirley Penry verbally abused Penry, making comments such as "I ought to just drowned you, you little bastard" and calling him "short little bastard" and "mother-fucker." On one occasion, Shirley Penry grabbed a knife and threatened to cut off Penry's penis. (*Id.*, pp. 1085-86, 1088, 1118).

The prosecution offered Dr. Walter Quijano and Dr. Stanton Samenow as: rebuttal witnesses. Dr. Quijano testified that he did not believe that Penry was mentally retarded, had brain damage, or lacked the capacity to control his impulses. Dr. Quijano and Dr. Samenow both testified that Penry had an antisocial personality and would be a danger in the future. Dr. Samenow testified that Penry could control himself and could act deliberately.

Based on this evidence and the court's instructions, the jury found Penry guilty of capital murder and sentenced him to death. In this habeas petition, Penry challenges some of the evidence presented, some of the evidence excluded, and the court's instructions.

III. The Applicable Legal Standards

A. The Antiterrorism and Effective Death Penalty Act

Penry filed this habeas petition on March 2, 1998; the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") governs. *Lindh v. Murphy*, 117 S. Ct. 2059, 2063 (1997); *Nobles v. Johnson*, 127 F.3d 409, 415 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1845 (1998); *Williams v. Cain*, 125 F.3d 269, 274 (5th Cir. 1997). The AEDPA provides

that a federal habeas petition shall not be granted with respect to any claim adjudicated on the merits in state court[5] unless the adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254 (d)(1)-(2). The AEDPA further provides:

> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(e)(1).

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[5] In *Nobles*, the court noted that before applying the AEDPA standards, the court must determine whether the petitioner's claim was adjudicated on the merits in state court proceedings. *Nobles*, 127 F.3d at 416. Penry does not contend that his claims were not adjudicated on the merits in state court. In *Drinkard v. Johnson*, 97 F.3d 751, 768 (5th Cir. 1996), *overruled on other grounds by Lindh*, 117 S. Ct. at 2059, the Fifth Circuit held that a claim is adjudicated on the merits if, as here, the state court in post-conviction proceedings has entered findings of fact and/or conclusions of law on the issue.

Section 2254(d) establishes different standards of review for questions of fact, questions of law, and mixed questions of law and fact. Federal courts reviewing factual determinations may grant relief only if the state court adjudication "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence." *Drinkard v. Johnson*, 97 F.3d 751, 767 (5th Cir. 1996) (quoting 28 U.S.C. § 2254(d)(2)), *cert. denied*, 117 S. Ct. 1114 (1997), *overruled on other grounds by Lindh*, 117 S. Ct. at 2059. In reviewing a question of law, a federal court may grant habeas relief only if it determines that a state court's decision was "contrary to . . . clearly established Federal law, as determined by the Supreme Court." *Id.* at 768 (quoting 28 U.S.C. § 2254(d)(1)). In reviewing a mixed question of law and fact, "a federal court may grant habeas relief only if it determines that the state court decision rested on 'an unreasonable application of [ ] clearly established Federal law, as determined by the Supreme Court' to the facts of the case." *Id.* at 767-68 (quoting 28 U.S.C. § 2254(d)(1)) (alteration in original); *see also Nobles*, 127 F.3d at 416.

The "unreasonable application" standard requires more than a simple disagreement with a state court decision. *Drinkard*, 97 F.3d at 768. An application of law to facts is "unreasonable 'only when it can be said that reasonable jurists considering the question would be of one view that the state court ruling was incorrect.' " *Jones v. Jones*, 163 F.3d 285, 303 (5th Cir. 1998) (citing *Cain*, 125 F.3d at 277). A state court decision will not be reversed if the decision is a reasonable, good faith application of Supreme Court precedent. *Mata v. Johnson*, 99 F.3d 1261, 1267 (5th Cir. 1996), *vacated in part on other grounds*, 105

F.3d 209 (5th Cir. 1997). A review of mixed questions of law and fact is "most closely akin to the traditional 'clearly erroneous' standard." *Id.* at 1267.

B. Procedural Default and Procedural Bar

"A procedural default . . . occurs when a prisoner fails to exhaust available state remedies and 'the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred.' " *Nobles*, 127 F.3d at 420 (quoting *Coleman v. Thompson*, 111 S. Ct. 2546, 2557 n.1 (1991)). To exhaust state remedies, a habeas petitioner "must have provided the state courts with a 'fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim.' " *Id.* (quoting *Anderson v. Harless*, 103 S. Ct. 276, 277 (1982)); *see also Shute v. Texas*, 117 F.3d 233, 237 (5th Cir. 1997) ("To exhaust available state remedies, a habeas petitioner 'must fairly apprise the highest court of his state of the federal rights which were allegedly violated.' " (quoting *Deters v. Collins*, 985 F.2d 789, 795 (5th Cir. 1993))).

Texas courts considering unexhausted claims on a successive habeas petition would find them procedurally barred. Article 11.071 § 5(a) of the Texas Code of Criminal Procedure prohibits a Texas court from considering a successive habeas petition on the merits unless the petition satisfies one of the exceptions set forth in § 5(a)(1),

(2), or (3).[6] The Texas Court of Criminal Appeals has applied article 11.071 to bar the presentation of new issues in successive petitions when the claimant's original petition was filed before the statute's effective date of September 1995. *Ex parte Davis*, 947 S.W.2d 216,221 (Tex. Crim. App. 1996) (en banc). The Fifth Circuit has held that article 11.071 is an adequate state procedural bar, finding that the rule is strictly and regularly enforced. *Muniz v. Johnson*, 132 F.3d 214, 221 (5th Cir. 1998). The

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[6] Article 11.071 § 5(a) provides:

(a) If an initial application for a writ of habeas corpus is untimely or if a subsequent application is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent or untimely initial application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable: (A) on the date the applicant filed the previous application; or (B) if the applicant did not file an initial application, on or before the last date for the timely filing of an initial application;

(2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or

(3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071 or 37.0711.

Texas abuse of the writ doctrine is also an adequate state procedural bar for the purpose of federal habeas review. *Nobles*, 127 F.3d at 423; *see also Fearance v. Scott*, 56 F.3d 633, 642 (5th Cir. 1995).

In addition to the exhaustion issue, claims for federal habeas relief are procedurally barred if they were defaulted in the state court proceedings. "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 111 S. Ct. at 2565; *see also Muniz*, 132 F.3d at 220.

" 'In order to prove a fundamental miscarriage of justice, the prisoner must assert his actual innocence.' " *Muniz*, 132 F.3d at 221 n.12 (quoting *Glover v. Cain*, 128 F.3d 900, 904 (5th Cir. 1997)); *see also Corwin v. Johnson*, 150 F.3d 467, 473 (5th Cir. 1998). In *Sawyer v. Whitley*, the Supreme Court held that a petitioner attempting to assert a procedurally defaulted challenge to his death sentence may overcome the default by showing that he is " 'actually innocent' of the death penalty." 112 S. Ct. 2514, 2517 (1992). The petitioner must "show by clear and convincing evidence that but for constitutional error at his sentencing hearing, no reasonable juror would have found him eligible for the death penalty." *Id.* at 2525.

The *Sawyer* actual innocence exception is limited to factual innocence. *See Callins v. Johnson*, 89 F.3d 210, 215

(5th Cir. 1996); *Fearance*, 56 F.3d at 637-38. In *Callins*, the Fifth Circuit held that even if a mentally retarded person was constitutionally ineligible for the death penalty, that individual is not "actually innocent" under *Sawyer*. 89 F.3d at 215. Penry's argument that he may assert procedurally defaulted claims because he is mentally retarded and, therefore, "actually innocent" of the death penalty, is barred by Fifth Circuit precedent.

Each of Penry's claims is examined under the AEDPA.

IV. The Jury Instructions on Mitigating Evidence (Claim I)

At the close of the sentencing phase of Penry's 1980 trial, the jury imposed the death penalty by unanimously answering "yes" to the three "special issues" set out in the Texas Code of Criminal Procedure at article 37.071(b). The Supreme Court in *Penry* I determined that none of the three "special issues" clearly provided a means for the jury to give effect to Penry's mitigating evidence. *Penry*, 109 S. Ct. at 2949. The Supreme Court stated:

> [I]n the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision.

Id. at 2952.

At the conclusion of the sentencing phase of the 1990 trial, the court again submitted the same Texas statutory special issues that the jury had answered in *Penry* I:

> Special Issue No. 1
>
> Was the conduct of the defendant, JOHNNY PAUL PENRY, that caused the death of the deceased, PAMELA CARPENTER, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> Special Issue No. 2
>
> Is there a probability that the defendant, JOHNNY PAUL PENRY, would commit criminal acts of violence that would constitute a continuing threat to society?
>
> Special Issue No. 3
>
> Was the conduct of the defendant, JOHNNY PAUL PENRY, in killing PAMELA CARPENTER, the deceased, unreasonable in response to the provocation, if any, by the deceased?

(Trans. Vol. 5, pp. 1330-31).

Unlike *Penry* I, however, the trial court on retrial also gave the following instructions:

> You are instructed that if you return an affirmative finding on each of the special issues submitted to you, the court shall sentence the defendant to death. You are further instructed that if you return a negative finding on any special issue submitted to you, the court shall

sentence the defendant to the Texas Department of Corrections for life. You are therefore instructed that your answers to the special issues, which determine the punishment to be assessed the defendant by the court, should be reflective of your finding as to the personal culpability of the defendant, JOHNNY PAUL PENRY, in this case.

You are instructed that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

(Trans. Vol. 5, p. 1329).

Penry argues that even with the added instructions, the special issues did not allow the jury to consider Penry's retardation and childhood abuse in deciding

whether to answer "yes" or "no." Penry contends that if the jurors wished to give effect to the mitigating evidence, the trial court's instruction forced them to lie when answering the special issues and to violate their oaths to answer the special issues truthfully. Penry argues that the mitigating evidence instruction was merely a ' "nullification instruction" that did not cure the *Penry* I constitutional error.

The Texas Court of Criminal Appeals, on Penry's direct appeal, considered and rejected this claim, holding that the "nullification instruction . . . is sufficient to meet the constitutional requirements of *Penry v. Lynaugh.*" *Penry*, 903 S.W.2d at 765. Whether a jury instruction placed relevant mitigating evidence beyond the reach of the jurors is a mixed question of law and fact. *Drinkard*, 97 F.3d at 768-69. In this case, the state court's ruling is not an unreasonable application of clearly established federal law.

In *Buchanan v. Angelone*, 118 S. Ct. 757 (1998), the Supreme Court articulated the standard for determining whether jury instructions adequately permit a jury to consider and give effect to mitigating evidence: "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 761 (quoting *Boyde v. California*, 110 S. Ct. 1190, 1198 (1990)). A court addresses this issue by considering "the entire context in which the instructions were given." *Buchanan*, 118 S. Ct. at 762; *see also Johnson v. Texas*, 113 S. Ct. 2658, 2669 (1993). "In evaluating the instructions, we do not engage in a technical parsing of this language of the instructions, but instead approach the instructions

in the same way that the jury would – with a 'commonsense understanding of the instructions in the light of all that has taken place at the trial.' " *Johnson v. Texas*, 113 S. Ct. at 2669 (quoting *Boyde*, 110 S. Ct. at 1198). "A *Penry* claim does not arise when constitutionally relevant evidence 'can be given mitigating effect *in some way* under the Texas special issues.' " *Davis v. Scott*, 51 F.3d 457, 464 (5th Cir. 1995) (quoting *Motley v. Collins*, 18 F.3d 1223, 1234 (5th Cir. 1994)) (emphasis in original).

Both the Supreme Court and the Fifth Circuit have held that jury arguments explaining how mitigating evidence can or should be considered in sentencing affect whether the jury was reasonably likely to have applied the instructions to prevent consideration of relevant mitigating evidence. *See Buchanan*, 118 S. Ct. at 762-63; *Drinkard*, 97 F.3d at 761 n.16. The Supreme Court has also noted that a defendant's presentation of extensive mitigating evidence is likely to convey to the jury that they may take the evidence into account in sentencing. *See Johnson v. Texas*, 113 S. Ct. at 368; *Boyde*, 110 S. Ct. at 1199-1200.

The record of Penry's 1990 trial supports the state appellate court's conclusion that the jury was able to give constitutionally sufficient consideration to Penry's mitigating evidence. During the voir dire examination of the venire in the 1990 trial, the prosecutor told the venire that they could answer one of the special issues "no" if they felt that Penry's mitigating evidence warranted a life sentence:

> Another area, in fact, that a jury can take into consideration is what we refer to loosely sometimes as mitigating evidence. There is not a separate question on mitigating evidence, but you

> will probably receive some sort of an instruction from the Judge, concerning mitigating evidence. . . . [F]urthermore, if you feel like that [mitigating] evidence is strong enough that you feel like it would even warrant a lesser sentence than death, that it would warrant a life sentence instead of death, then you can answer one or more of these questions no, so that the defendant will receive a life sentence instead of the death penalty.

(S.F. Vol. 15, pp. 186-87).

During closing argument in the sentencing phase, defense counsel emphasized this point:

> You are going to get just three yes or no questions. You are not going to get any questions about mitigating circumstances. Three questions called Special Issues, and none of them say anything about mentally retarded, none of them say anything about child abuse, but, the Judge told you, he told you that when you answer those questions you are to give affect [sic] and consideration to mitigating circumstances. If you determine, when giving affect [sic] to the mitigating evidence, if any, that a life sentence is reflected by a negative finding of the issue under consideration, rather than the death sentence, appropriate response to the personal culpability of the Defendant, then, a negative finding should be given to one of the Special Issues.

(S.F. Vol. 51, pp. 1902-03). Defense counsel then explicitly told the jury that they were able to answer "no" to one of the special issues despite the fact that a "no" answer was not the "literally correct" answer:

> Let me try to simplify it. If, when you thought about mental retardation and the child abuse, you think that this guy deserves a life sentence, and not a death sentence, decide life in prison is punishment enough, then, you got to answer one of those questions no. The Judge has not told you which question, and you have to give that answer, even if you decide the literally correct answer is yes. Not the easiest instruction to follow, and the law does funny things sometimes, but, it is what it says, and I have taken all of this time with you to make sure that you understand what it says. If you think that because of this mitigating evidence the man deserves a life sentence, then, there has got to be a no on that verdict sheet somewhere.

(*Id.*, p. 1903).

The court's instruction on the effect of mitigating evidence tracked *Penry* I by "informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty." The instruction went further, informing the jurors that they should answer one of the special questions "no" if they believed that Penry's personal culpability warranted a life sentence instead of death. Both the prosecutor and defense counsel told the jurors that they were able to answer one of the special issues "no" if they believed Penry's mitigating evidence warranted a life sentence, even if that answer was not "literally correct."

The Fifth Circuit recently approved a mitigating evidence instruction very similar to the instruction given to Penry's jury. In *Emery v. Johnson*, 139 F.3d 191 (5th Cir.

1997), the petitioner was sentenced to death under the version of the Texas Code of Criminal Procedure article 37.071 used in Penry's trial and retrial. The trial court in *Emery* gave an instruction which was virtually identical to that given by the trial court at Penry's retrial. The Fifth Circuit upheld the instruction against the petitioner's *Penry* challenge, stating:

> This instruction allowed the jury to consider any appropriate mitigating circumstance, including a history of child abuse, and required the jury not to sentence Emery to death if a life sentence was appropriate in light of his moral culpability. The instruction adequately addressed the Court's concerns about Texas's death penalty scheme by giving the jury the ability to consider any appropriate mitigating circumstance.

Id. at 200. The Fifth Circuit's ruling in *Emery* supports the state court's conclusion as to Penry's first claim.

The state appellate court's conclusion that the trial court's instructions on mitigating evidence were constitutional is consistent with, and not an unreasonable application of, clearly established federal law. This court DENIES Penry's claim that the trial court's instructions did not permit the jury to consider and give effect to his mitigating evidence of mental retardation and childhood abuse.

V. The Eighth Amendment and an Emerging National Consensus (Claims II and III)

In *Penry* I, Penry argued that the execution of a mentally retarded person "like himself with a reasoning

capacity of approximately a 7-year-old would be cruel and unusual [punishment] because it is disproportionate to his degree of personal culpability." *Penry* I, 109 S. Ct. at 2956. The Supreme Court rejected this argument, holding that sentencing juries are able to evaluate sufficiently whether the extent of a particular defendant's mental retardation reduces his culpability to justify declining to impose a death sentence.

In *Penry* I, Penry also argued that "there is objective evidence . . . of an emerging national consensus against execution of the mentally retarded, reflecting the 'evolving standards of decency that mark the progress of a maturing society.' " *Id.* at 2955 (quoting *Trop v. Dulles*, 78 S. Ct. 590, 598 (1958)). The Supreme Court rejected this argument, finding insufficient evidence of a national consensus against execution of the mentally retarded to make it unconstitutional. *Id.* The Court held that the execution of a mentally retarded person would not violate the Eighth Amendment as long as the sentencing jury could consider and give effect to the nature and extent of the defendant's mental retardation in each case. *Id.* at 2958.

In his present petition, Penry again argues that the execution of a mentally retarded person violates the Eighth Amendment. Penry argues that since *Penry* I, a national consensus against execution of the mentally retarded has developed. Penry argues that this emerging national consensus against execution of the mentally retarded also "establishes a societal consensus against . . . the execution of persons exhibiting a certain level of mental retardation." Penry relies on new evidence, not presented in *Penry* I, to argue that current community views prohibit the execution of all mentally retarded

persons. Penry also relies on this new evidence to argue that the execution of an individual with his level of mental retardation is constitutionally prohibited.

This court considers both of Penry's arguments below.

A. The "Categorical" Challenge to the Death Sentence (Claim III)

Respondent argues that Penry's claim that the Eighth Amendment categorically prohibits execution of mentally retarded individuals is procedurally barred because, although Penry argued in state court that his execution would be unconstitutional because of *his* level of intelligence and background, he did not argue that execution of *any* mentally retarded person was categorically prohibited. Penry's direct appeal to the Court of Criminal Appeals did not contain an argument that "evolving standards of decency" categorically prohibit execution of any mentally retarded person. In his direct appeal, Penry did not cite or rely upon evidence of an evolving national standard forbidding execution of any mentally retarded individual. In contrast, Penry explicitly relies upon such evidence to support both of his arguments before this court. Penry also failed to raise this claim in his state habeas application. (Petition for a Post-Conviction Writ of Habeas Corpus, *Ex parte Penry*, Cause No. 15,977-C).

Penry did not give the Texas Court of Criminal Appeals " 'a fair opportunity' to apply controlling legal principles to the facts bearing upon his . . . claim" that the

Eighth Amendment categorically bars execution of the mentally retarded. The claim is procedurally barred.[7]

Even if the claim was not procedurally barred, this court would reject the claim on its merits. Penry argues that there is sufficient objective evidence of a national consensus against execution of mentally retarded persons to enable a court to find that permitting the State of Texas to execute Penry would violate the "evolving standards of decency" that the Eighth Amendment protects. Penry has a "heavy burden" to show the national consensus he asserts. *Stanford v. Kentucky*, 109 S. Ct. 2969, 2977 (1989) (quoting *Gregg v. Georgia*, 96 S. Ct. 2909, 2926 (1976)).

In considering this argument in *Penry* I, the Supreme Court required an "objective indicator of contemporary values upon which we can rely," such as the "judgment of legislatures and juries." *Penry* I, 109 S. Ct. at 2955-56. The *Penry* I Supreme Court considered the following evidence:

- a federal criminal statute, the Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(l) (1988), prohibiting the execution of a mentally retarded person;

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[7] This court does not find Penry's claim to be barred by the law of the case doctrine. Penry's evidence of national opposition to the execution of the mentally retarded arose after *Penry* I and demonstrates more extensive opposition to execution of the mentally retarded than was shown in *Penry* I. *See Society of the Roman Catholic Church of the Diocese of Lafayette, Inc. v. Interstate Fire & Cas. Co.*, 126 F.3d 727, 735 (5th Cir. 1997) (noting that the law of the case doctrine does not bar adjudication of a claim presented in a previous appeal if the "evidence in a subsequent trial was substantially different").

- one state, Georgia, banned the execution of a mentally retarded person;
- one state, Maryland, had enacted a statute banning the execution of a mentally retarded person to take effect on July 1, 1989;
- public opinion polls taken in Texas, Florida, and Georgia, showing public opposition to execution of the mentally retarded; and
- a resolution of the American Association on Mental Retardation opposing execution of the mentally retarded.

Id. at 2955.

The Supreme Court found that this evidence, combined with evidence that fourteen states did not allow the death penalty under any circumstances, was insufficient to show a national consensus against execution of the mentally retarded. *Id.* The Supreme Court found that public opinion polls expressing disapproval of the execution of mentally retarded persons and the opposition of the American Association on Mental Retardation were not sufficiently reliable indicators of a national consensus to allow the Court to find the execution of mentally retarded persons categorically prohibited by the Eighth Amendment. "The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely." *Id.*

Penry now offers evidence that the federal government and twelve of the thirty-eight states that allow capital punishment specifically exempt the mentally

retarded from the death penalty. *See* Violent Crime Control and Law Enforcement Act, 18 U.S.C. § 3596(c); Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(l); ARK. CODE ANN. § 5-4-618(b); COLO. REV. STAT. § 16-9-403; GA. CODE ANN. § 17-7-131(j)); IND. CODE ANN. § 35-36-9-6; KAN. STAT. ANN. § 21-4623(d); KY. REV. STAT. ANN. § 532.140; MD. ANN. CODE OF 1957, ART. 27 § 412(g); NEB. REV. STAT. ANN. § 28-105.01(2); N.M. STAT. ANN. § 31-20A-2.1 (B); N.Y. CRIM. PROC. LAW § 400.27(12); TENN. CODE ANN. § 39-13-203(b); WASH. REV. CODE ANN. § 10.95.030(2). Twelve additional states and the District of Columbia do not allow capital punishment under any circumstances.[8]

The Supreme Court has found the application of the death penalty to a particular class of persons inconsistent with "evolving standards of decency" in cases in which only a small number of states permitted the challenged

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[8] Penry also cites two states in which bills prohibiting execution of mentally retarded persons are pending in the state legislature. *See* H.B. 2544, 43rd Leg. (Ariz. 1998) and H.B. 1288, 89th Leg., 2d Reg. Sess. (Mo. 1998). Both bills were introduced on January 13, 1998. Though neither bill was enacted into statute, both states have similar bills pending in their 1999 legislative sessions. *See* H.B. 2539, 44th Leg. (Ariz. 1999); H.B. 425, 90th Leg., 1st Reg. Sess. (Mo. 1999). Several other states, including Texas, are considering similar bills in their 1999 legislative sessions. *See e.g.*, H.B. 2121, 76th Leg. (Tex. 1999); S.B. 180, 181st Leg. (Mass. 1999); H.F. 26, 78th Leg., 1st Sess. (Iowa 1999); S.B. 188, 74th Leg. (S.D. 1999).

Penry also cites two states that by statute allow capital punishment but have not executed any prisoners since the Supreme Court upheld the constitutionality of capital punishment *in Gregg v. Georgia*, 96 S. Ct. 2909, 2923 (1976), and do not have any prisoners currently on death row. Penry argues that these states have "implicitly rejected" capital punishment.

application of the death penalty. *See Ford v. Wainwright*, 106 S. Ct. 2595, 2601 (1986) (no states permitted execution of the legally insane); *Enmund v. Florida*, 102 S. Ct. 3368, 3374 (1982) (only eight states permitted capital punishment for participation in a robbery in which an accomplice kills a person); *Coker v. Georgia*, 97 S. Ct. 2861, 2867-68 (1977) (only one state permitted capital punishment for the crime of rape of an adult woman); *see also Thompson v. Oklahoma*, 108 S. Ct. 2687, 2695-96 (1988) (no state that set minimum age limits on imposition of the death penalty permitted the execution of those who committed capital murder at age fifteen or younger).

In cases in which the Court has found that imposing the death penalty on a particular category of persons did not offend evolving standards of decency, over half the states that permitted capital punishment allowed execution of that category of persons. In *Stanford*, the Supreme Court considered whether imposing the death sentence on a sixteen or seventeen year-old defendant violated the Eighth Amendment. The Court noted that "[o]f the 37 States whose laws permit capital punishment, 15 decline to impose it upon 16-year-old offenders and 12 decline to impose it on 17-year-old offenders." *Stanford*, 109 S. Ct. at 2975. The Court concluded that "a majority of the States that permit capital punishment authorize it for crimes committed at age 16 or above." *Id.* at 2976. The Court relied on this empirical result in finding that the Constitution did not forbid such punishment. In *Tison v. Arizona*, 107 S. Ct. 1676, 1686 (1987), the Court upheld Arizona's imposition of the death penalty for a defendant convicted of being a major participant in a felony with reckless indifference to human life, when eleven states

that permitted capital punishment forbade the challenged imposition of the death penalty.

The record before this court shows that twenty-six of the thirty-eight states that permit capital punishment allow execution of the mentally retarded.[9] Under the Supreme Court precedents, this level of acceptance in the state legislatures does not provide the objective support for Penry's argument necessary before a court may find a violation of the Eighth Amendment on the ground of an emerging national consensus.

Penry also submits evidence from polls finding that jurors are less likely to sentence a defendant to death if the defendant is mentally retarded and evidence that relatively few mentally retarded persons have been executed since 1976. This evidence does not show that jurors or prosecutors are categorically opposed to the execution of all mentally retarded persons. Rather, the evidence supports the ability of jurors to give effect to a particular

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[9] The *Stanford* Court explicitly rejected the argument that the number of states permitting the challenged application of the death penalty should be compared to the number of states overall, including those that do not allow the death penalty at all. *Stanford*, 109 S. Ct. at 2975-76 n.2. The Court also rejected the argument that the fact that the federal government has made a class of individuals ineligible for the death penalty is determinative of a national consensus. *See id.* at 2977 ("[E]ven if it were true that no federal statute permitted the execution of persons under 18, that would not remotely establish – in the face of a substantial number of state statutes to the contrary – a national consensus that such punishment is inhumane, and more than the absence of a federal lottery establishes a national consensus that lotteries are socially harmful.").

defendant's mental retardation as a mitigating circumstance in sentencing. *See Stanford*, 109 S. Ct. at 2977.

In *Penry* I, the Supreme Court rejected Penry's evidence of public opinion polls and statements from professional associations expressing opposition to execution of mentally retarded persons as insufficient to show a national consensus against the application of the death penalty to a particular class of persons. *Penry* I, 109 S. Ct. 2955. The evidence in *Penry* II portrays a growing disapproval of the execution of the mentally retarded. However, the Supreme Court has not held that evidence of a trend against a particular application of the death penalty is sufficient to enable a court to find that application "cruel and unusual." *See Stanford*, 109 S. Ct. at 2975-76 (requiring the petitioner to establish a "*degree* of national consensus . . . sufficient to label a particular punishment cruel and unusual" (emphasis added)); *id* at 2977 (stating that the petitioner has a " 'heavy burden' . . . to establish a national consensus" against an application of the death penalty); *id* (noting that the petitioner had not established a "settled consensus"); *Penry* I, 109 S. Ct. at 2955 (noting that although Penry's public opinion and professional association evidence may "ultimately find expression in legislation," the evidence had failed to establish a present "national consensus").

Penry's arguments and data do not respond to a fundamental problem the Supreme Court identified with the "categorically ineligible" approach Penry advances. In *Penry* I, the Supreme Court noted that a categorical prohibition against imposing a punishment against all retarded persons but permitting the same punishment for others had a troubling and dangerous consequence. The

Court noted that "[m]entally retarded persons are individuals whose abilities and experiences can vary greatly," *Penry* I, 109 S. Ct. at 2957, as can their ability to bear personal culpability for their actions. The Court recognized the difficulty, and danger, in reducing all mentally retarded individuals to a single category. Such a categorical approach could improperly limit hard-won opportunities for retarded persons to participate fully in events requiring legal recognition, such as marriage or making contracts. *Id.* at 2958. Penry does not address the difficulty inherent in his argument.

Penry's evidence is not sufficient to permit this court to find that there currently exists a "national consensus" against execution of mentally retarded persons, making such executions unconstitutional. Penry is not entitled to federal habeas relief on this claim, both because it is procedurally barred and on the merits. This court DENIES Penry's claim that the execution of any mentally retarded person violates the Eighth Amendment's prohibition of "cruel and unusual" punishment.

B. The Particularized Challenge to the Death Sentence (Claim II)

In his federal petition for habeas relief, Penry reiterates the argument he made on direct appeal in state court, that the degree and nature of his mental retardation and history of childhood abuse make him insufficiently culpable to permit his execution. Respondent asserts that the claim is barred by 28 U.S.C. § 2244(b)(1) as a successive petition because the Supreme Court considered and rejected it in *Penry* I.

Section 2244(b)(1) states: "A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed." The AEDPA does not alter the pre-AEDPA definition of a " 'second or successive' petition." *In re Gasery*, 116 F.3d 1051, 1052 (5th Cir. 1997). Circuits that have considered the issue have held that a claim in a habeas petition filed after a retrial and second conviction is not treated as presented in a "second" or "successive" petition if it attacks only the second conviction or sentence. *See, e.g., Esposito v. United States*, 135 F.3d 111, 113 (2d Cir. 1997); *Pratt v. United States*, 129 F.3d 54, 62 (1st Cir. 1997); *Palmer v. Clarke*, 961 F.2d 771, 774-75 (8th Cir. 1992). Penry's claim that the evidence of the nature and extent of his mental impairment presented in the 1990 retrial makes the death sentence he received unconstitutional is not barred by section 2244(b)(1).

Respondent alternatively argues that this court is barred from considering Penry's argument by the "law of the case" doctrine. The doctrine of the law of the case is inapplicable because additional evidence, not presented in his first trial, provides changed factual support for Penry's claim. *Society of the Roman Catholic Church of the Diocese of Lafayette, Inc. v. Interstate Fire & Cas. Co.*, 126 F.3d 727, 735 (5th Cir. 1997). Penry's claim is not barred by the law of the case doctrine.

On Penry's direct appeal, the Texas Court of Criminal Appeals noted that the "Eighth Amendment does not preclude the execution of mentally retarded persons," citing *Penry* I. *Penry*, 903 S.W.2d at 766. The Texas appellate court stated further that there is no "authority stating that it is unconstitutional to execute persons who have

brain damage or were abused as children." *Id.* at 766-67. Again citing *Penry* I, the Texas court concluded that the Eighth Amendment was satisfied because Penry's sentencing jury had the "means to consider all of the evidence, including [Penry's] mitigating circumstances, and yet determined that death was the appropriate punishment." *Id.* at 767. The state court's decision on this mixed question of law and fact is not an unreasonable application of federal law as clearly established by the United States Supreme Court.

In his second trial, Penry presented Dr. Randall Price as a witness. Dr. Price drew an explicit link between what he believed to be Penry's organic brain damage and Penry's inability to control himself or use good judgment. (S.F. Vol. 48, pp. 1337-38). Penry also presented far more graphic and extensive evidence of the abuse he suffered as a child than had been presented in his first trial. Penry's new evidence of childhood abuse included evidence that he had suffered more frequent and more violent physical, mental, and psychological abuse than had been apparent from the evidence introduced in his first trial.

In *Penry* I, the Supreme Court held that the constitutional requirements are met when a jury is able to consider and give effect to mitigating evidence that may show that a particular defendant cannot be held culpable for his actions. *Penry* I, 109 S. Ct. at 2958. In Penry's second trial, the jury heard extensive mitigating evidence, argument, and instructions. The jury was able to consider whether Penry's mental retardation and his childhood abuse lessened Penry's culpability to a level at which the death penalty was not an "appropriate punishment."

This court finds that, considering the additional mitigating evidence Penry presented in his second trial, the Texas Court of Criminal Appeals' conclusion that the execution of someone with Penry's level of mental retardation and history of childhood abuse does not violate the Eighth Amendment was not an unreasonable application of federal law. This court DENIES Penry's request for habeas relief based on Claim II.

C. The Combination of Claims II and III

Penry characterizes Claim II as dependent on his new evidence of a national trend toward disapproval of execution of the mentally retarded. "[I]t may be possible that this objective evidence establishes a societal consensus against only the execution of persons exhibiting a certain level of mental retardation." (Docket Entry No. 28, p. 21). This argument is not barred by the law of the case doctrine because it is narrower than the categorical Eighth Amendment argument the Supreme Court considered in *Penry* I and because it relies on "substantially different" evidence. Because it attacks a second conviction, Penry's habeas petition is not governed by rules restricting the consideration of successive petitions. Penry's claim is not barred by 28 U.S.C. § 2244(b)(2), which forecloses consideration of a claim presented in a successive petition that was not presented in a prior petition, because the claim relies on evidence of an alleged national consensus developed since Penry's first habeas petition.

Penry did not, however, present this claim to the Texas courts on appeal or during the state habeas proceedings. Indeed, Penry did not articulate this argument

until his reply. Respondent did not have an opportunity to raise a procedural default bar to the argument. This court is not required to raise a procedural default *sua sponte*. *See Trest v. Cain*, 118 S. Ct. 478, 480 (1997) ("We are not aware of any precedent stating that a habeas court must raise [a procedural default] where the State itself does not do so."). While a district court may exercise its discretion to raise a procedural default *sua sponte*, *Magouirk v. Phillips*, 144 F.3d 348, 357 (5th Cir. 1998), this court concludes that it should not avoid the merits of Penry's "combination" claim by raising a procedural default bar.

This court finds that Penry's new evidence of the degree of his mental retardation and the effects of the childhood abuse he suffered, in combination with the previously available evidence, is not sufficient to raise a fact issue that a national consensus has developed, making it unconstitutional to execute such an individual. Penry's summary judgment evidence does not provide the objective support necessary to create a fact issue that a national consensus against the execution of a person with Penry's level and degree of mental capability has developed, requiring a finding of a constitutional violation. Summary judgment in favor of respondent on this claim is appropriate. *See, e.g, Goodwin v. Johnson*, 132 F.3d 162, 169 (5th Cir. 1997) (applying the Rule 56 summary judgment standard to a capital defendant's habeas petition).

This court DENIES Penry's claim that his execution violates the Eighth Amendment because there exists a national consensus against applying the death penalty to

an individual with Penry's level of mental retardation and background of abuse.

VI. The *Simmons* Claim (Claim IV)

In *Simmons v. South Carolina*, 114 S. Ct. 2187, 2190 (1994), the Supreme Court held that when a capital murder defendant would be ineligible for parole under state law if sentenced to life imprisonment, and the prosecution argues that the defendant would be dangerous in the future, due process requires the jury to be informed that the defendant would be ineligible for parole. The Fifth Circuit has rejected the extension of the *Simmons* rule to a Texas capital defendant. Under Texas law, a capital defendant is not legally ineligible for parole. In *Allridge v. Scott*, the Fifth Circuit held that *Simmons* applies only to situations in which the defendant is "legally ineligible" for parole.[10] 41 F.3d 213, 222 (5th Cir. 1994); *see also Boyd v.*

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[10] Penry argues that this court should not follow the *Allridge* line of cases in light of an opinion joined by four Justices of the Supreme Court dissenting from the denial of a petition for writ of *certiorari* in *Brown v. Texas*, 118 S. Ct. 355 (1997) (Stevens, J., dissenting from the denial of petition for a writ of *certiorari*). In his opinion, Justice Stevens noted that there was an "obvious tension" between *Simmons* and the refusal by the State of Texas to allow a defendant to give the jury truthful information about his parole eligibility. *Id.* at 355. An opinion dissenting from the denial of a petition for writ of *certiorari* does not have precedential value. The Fifth Circuit cases on point, based on Supreme Court majority opinions, are binding on this court. *See Teague v. Lane*, 109 S. Ct. 1060, 1067-68 (1989). The Fifth Circuit has recognized, but specifically declined to apply, Justice Stevens' dissenting opinion in an opinion addressing a *Simmons* claim. *See Muniz*, 132 F.3d at 224 n.22 (citing Justice Stevens' dissenting opinion as "*but cf.*").

Johnson, No. 97-10823, 1999 WL 71660, at *5 (5th Cir. Feb. 12, 1999) (to be published in F. 3d.); *Muniz v. Johnson*, 132 F.3d 214, 224 (5th Cir. 1998); *Woods v. Johnson*, 75 F.3d 1017, 1037 (5th Cir. 1996); *Montoya v. Scott*, 65 F.3d 405, 416 (5th Cir. 1995).

It is undisputed that Penry would have been legally eligible for parole had he been sentenced to life imprisonment. However, during the sentencing phase of the retrial, Penry offered into evidence his signed statement purporting "to give up [his] right to parole for the rest of [his] life." The trial court sustained the prosecutor's objection to the introduction of this statement and excluded Penry's statement from evidence. (S.F. Vol. 50, pp. 1600-02).

During the sentencing phase of the trial, the court instructed the jury not to consider the possibility of parole in determining Penry's sentence. (Trans. Vol. 5, p. 1328; S.F. Vol. 51, pp. 1915-16). In his closing argument, the prosecutor argued that Penry would be a future danger to society. (S.F. Vol. 51, pp. 1946-47). After closing arguments, immediately after the jury began to deliberate, Penry's counsel: objected to the prosecutor's future dangerousness argument and moved for a mistrial. (*Id.*, pp. 1948-49). The trial court overruled Penry's objection and denied his motion. (*Id.*, p. 1949).

Penry argues that the trial court erred by permitting the prosecutor to argue that Penry would be a future danger to society while denying Penry the opportunity to present evidence that parole was at least highly unlikely. Penry appears also to challenge the trial court's refusal to give Penry's requested jury instruction regarding parole.

On direct appeal, the Texas Court of Criminal Appeals rejected Penry's challenge to the jury instruction, noting that Penry's offer of "waiver of parole" was not legally binding. *Penry*, 903 S.W.2d at 763-64. The court rejected Penry's challenge to the prosecutor's argument as not properly preserved for review. *Id.* at 764.

A. The Prosecution's Argument

Penry procedurally defaulted on his claim that the prosecution's closing argument violated his rights. A procedural default in state court bars federal habeas review if the last state court rendering a judgment clearly and expressly rests its judgment on the procedural default. *Muniz*, 132 F.3d at 220; *Moore v. Roberts*, 83 F.3d 699, 702 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 772 (1997). The Fifth Circuit has held that the Texas contemporaneous objection rule is an independent and adequate state procedural bar. *Muniz*, 132 F.3d at 221; *Livingston v. Johnson*, 107 F.3d 297, 311-12 (5th Cir. 1997); *Amos v. Scott*, 61 F.3d 333, 345 (5th Cir. 1995). Penry does not argue that he meets the cause and prejudice or actual innocence exceptions to the procedural default rule. To the extent that Penry's *Simmons* claim rests on the trial court's failure to grant his motion for a mistrial based on the prosecutor's future dangerousness argument, he has procedurally defaulted that claim.

B. The Trial Court's Instructions

Penry's *Simmons* claim can also be read as a challenge to the trial court's failure to instruct the jury on the remoteness of Penry's chances for parole, based on

Penry's signed "waiver." The Court of Criminal Appeals rejected Penry's *Simmons* claim on the merits, holding that under Texas law "[t]he matter of parole or a defendant's release thereon is not a proper consideration for a jury's deliberations in the punishment phase of a capital murder trial." *Penry*, 903 S.W.2d at 764. The Texas court's conclusion is consistent with the Fifth Circuit decision in *Allridge*, and is neither contrary to, nor an unreasonable application of, clearly established federal law.

Penry argues that his case is distinguishable from *Allridge* because he offered, in a written, signed statement, to become "parole ineligible." Penry offers the affidavit of Dr. James W. Marquart, a professor of criminology at Sam Houston State University, opining that the Texas parole board would have given "great weight" to Penry's signed "waiver" in deciding whether to grant Penry parole in the future. (Docket Entry No. 19, Appendix, Ex. C, Affidavit of James W. Marquart, ¶ 4). Dr. Marquart recognized that Penry's signed statement was not a legally binding waiver of parole, but stated that "a parole board would have seen that document and given it great weight in determining whether Mr. Penry should be paroled, "even if Penry "changed his mind and sought to 'take back' this statement." (*Id.*, ¶¶ 4, 7). In Dr. Marquart's opinion, the combination of the nature of Penry's crime and Penry's signed statement would have "forever erased [Penry's] chances of parole." (*Id.*, ¶ 18). Penry argues that in sentencing, the jury was entitled to consider that for all practical purposes, Penry would not receive parole.

It is undisputed that Penry's statement of waiver did not make him "legally ineligible" for parole. Dr. Marquart's affidavit speculates as to what the parole board might decide in the future. The Fifth Circuit cases clearly hold that *Simmons* is restricted to situations in which the defendant is presently ineligible for parole, as a matter of law. *See Boyd*, 1999 WL 71660, at *5; *Muniz*, 132 F.3d at 224; *Woods*, 75 F.3d at 1037; *Johnson v. Scott*, 68 F.3d 106, 111 (5th Cir. 1995); *Montoya*, 65 F.3d at 416; *Kinnamon v. Scott*, 40 F.3d 731, 733 (5th Cir. 1994). As the court stated in *Allridge*:

> A capital defendant's parole ineligibility . . . must be a matter of law because evidence of such ineligibility is inherently "truthful" and allows the defendant to deny or explain the state's case for future dangerousness. But if a defendant's ineligibility is a matter of fact, i.e., the defendant *probably* will not be eligible for parole, then the evidence is purely speculative (maybe even inherently "untruthful") and therefore cannot positively deny future dangerousness. The jury is left only to speculate about what a parole board may, or may not, do twenty or thirty years hence.

Allridge, 41 F.3d at 221-22 (citations omitted) (emphasis in original).

Penry argues that his case is different from *Allridge* because the prosecutor based his future dangerousness argument on Penry's danger to "free" society, improperly referencing a possibility of parole. The case law does not support Penry's proffered distinction. Even when the prosecution argues that a defendant will be a future danger to "free" society, *Simmons* does not apply unless

the defendant is legally ineligible for parole. *Id.* at 222. Penry's case does not violate *Simmons* simply because the prosecutor argued that Penry may be a future danger to "free" society.

This court must follow binding Fifth Circuit precedent. That precedent establishes that the Texas Court of Criminal Appeals' rejection of Penry's *Simmons* claim was not "contrary to, or an unreasonable application of, clearly established federal law, as determined by the Supreme Court." This court DENIES Penry's *Simmons* claim.[11]

VII. The *Estelle v. Smith* Claim (Claim V)

In *Estelle v. Smith*, 101 S. Ct. 1866 (1981), the Supreme Court held that the prosecution's use of a capital murder

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[11] Penry requests an evidentiary hearing on his *Simmons* claim. Penry argues that he could offer evidence "regarding how often, if ever, a defendant tried for capital murder has been paroled – at any point in his or her sentence." (Docket Entry No. 28, p. 39). Even if Penry presented such evidence, it would not distinguish his case from the *Allridge* line of cases. This court may not grant an evidentiary hearing on a claim which the petitioner has failed to develop in state court unless "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2254(e)(2)(B). Penry's alleged constitutional error does not relate to his guilt. Moreover, even if Penry could prove the facts underlying the claim, he would not be entitled under *Allridge* to a reversal of his sentence. Penry's request for an evidentiary hearing to develop his *Simmons* claim is DENIED.

defendant's pretrial psychiatric examination in the sentencing phase as the basis for an examining psychiatrist's opinion as to the defendant's future dangerousness violated the Fifth and Sixth Amendments. The Supreme Court held that in the absence of proper *Miranda* warnings and an effective waiver from the defendant, the Fifth Amendment privilege against self-incrimination precluded the State from using statements the defendant made during the pretrial psychiatric examination to prove the defendant's future dangerousness. *Id.* at 1876.

In *Buchanan v. Kentucky*, 107 S. Ct. 2906 (1987), the Supreme Court clarified that its holding in *Estelle* did not apply if the defendant requested a pretrial psychiatric examination or if the defendant presented psychiatric evidence at trial. *Id.* at 2917-18. The Fifth Circuit has held that the first exception, that the defendant requests the examination, applies only if the defendant specifically requests an evaluation as to his future dangerousness. *See Vanderbilt v. Collins*, 994 F.2d 189, 196 (5th Cir. 1993); *Battie v. Estelle*, 655 F.2d 692, 702 (5th Cir. 1981).

In *Estelle v. Smith*, the Supreme Court also found that the State's failure to give defense counsel notice of the examination, including its scope and nature, violated the defendant's Sixth Amendment rights. *Estelle*, 101 S. Ct. at 1877. The State violates the Sixth Amendment if defense counsel is told that the defendant will be examined, but not that the examination will be used as evidence of the defendant's future dangerousness. *Vanderbilt*, 994 F.2d at 198. In *Powell v. Texas*, 109 S. Ct. 3146 (1989), the Court held that a defendant does not waive his Sixth Amendment right to counsel even if the defendant waives a Fifth Amendment challenge to the State's use of statements he

or she made in a pretrial psychiatric examination by requesting the examination or by introducing psychiatric evidence. *Id.* at 3150.

Penry argues that both his Fifth and Sixth Amendment rights were violated when the prosecution presented testimony from three psychiatrists and then used that testimony to argue that Penry would be dangerous in the future and that his mental status did not make the death sentence inappropriate.

A. The Psychiatric Testimony and the Prosecution's Argument

1. Dr. Fason's Testimony

During the guilt/innocence phase of Penry's second trial, Dr. Fason told the jury that he had conducted one three-minute interview with Penry and one twenty-minute interview. During both interviews, Penry communicated fully, identified his lawyer, and acted appropriately. (S.F. Vol. 46, pp. 786-88). Dr. Fason denied that he observed "any kind of a psychosis, or other type of mental illness" in Penry during the interviews. (*Id.*, p. 788). Dr. Fason discussed the accuracy of IQ tests and noted that a personality disorder, such as an antisocial personality, could affect a person's score on an IQ test. (*Id.*, pp. 788-92). Dr. Fason stated that he had reviewed "rather extensive" records "pertaining to Johnny Paul Penry's prior history" and records of neurological testing done on Penry. (*Id.*, pp. 794-95). Dr. Fason stated that he disagreed with a report that concluded that Penry "may have a significant degree of brain damage." (*Id.*, p. 795).

The prosecutor then asked Dr. Fason for his opinion as to Penry's mental status in 1979, when the alleged rape and murder occurred. Dr. Fason concluded that "based on all of those records that [he] reviewed and [his] personal interviews with [Penry], the tests, [Dr. Fason's] training and experience and education," Penry "is on the borderline between mild mental retardation and dull normal." (*Id.*, p. 796). Dr. Fason also testified that Penry "has a personality disorder, an anti-social personality disorder." (*Id.*). Dr. Fason admitted that a person with an antisocial personality disorder could also be referred to as a "psycho-path." (*Id.*). Dr. Fason described an antisocial personality as "a person that has repeated difficulties with authority. They tend to be very selfish, callous and self-centered." (*Id.*, p. 798). Dr. Fason testified that he did not know of a cure for an antisocial personality. (*Id.*, p. 800). Dr. Fason then again explained that an antisocial personality disorder could lower a person's score on an IQ test.

The prosecutor asked Dr. Fason whether Penry "is the type of person that looks up to an authority figure." (*Id.*, p. 804). Dr. Fason testified that he believed Penry does not respect authority and would not be "led easily by other people" because of his antisocial personality. (*Id.*, pp. 804-05). Dr. Fason also testified that he believed Penry had the capacity to act intentionally and possessed the intellectual capability to understand *Miranda* warnings and waive those warnings knowingly and intelligently. (*Id.*, pp. 811-13).

Although Dr. Fason did not specifically testify as to Penry's future dangerousness, the prosecutor referred to Dr. Fason's testimony during the sentencing phase of the

trial in arguing Penry's future dangerousness. (S.F. Vol. 51, pp. 1933-34).

2. Dr. Quijano's Testimony

During the sentencing phase, Dr. Quijano testified that although Penry's IQ test scores placed him in the "mildly mentally retarded" to "borderline" range of intelligence, Penry's "adaptive skills" were sufficient to classify him as "not mentally retarded." (S.F. Vol 50, pp. 1629, 1648). Dr. Quijano also testified that he believed Penry had the ability to control his actions. After Dr. Quijano denied that Penry was retarded or had organic brain damage, Dr. Quijano testified that Penry suffered from an antisocial personality disorder. (*Id.*, pp. 1648-49). As evidence of Penry's antisocial personality, Dr. Quijano noted

> repeated violations of the law, disregard of the rights of others, the inability to learn from previous experience in the sense that one does not profit from the punishment or from being caught. There is an element of cold bloodiness [sic] without it, the person does not experience remorse. . . .

(*Id.*, p. 1651). Dr. Quijano also testified that persons with an antisocial personality and a history of violence could be classified as dangerous and that there is no cure for an antisocial personality. (*Id.*, p. 1652). Dr. Quijano testified that he believed Penry "is more likely to engage in continuing acts of violence in the future." (*Id.*, p. 1654).

3. Dr. Samenow's Testimony and Dr. Peebles' Report

Dr. Samenow testified during the sentencing phase that he believed Penry to have an "anti-social personality." (*Id.*, p. 1731). Dr. Samenow agreed that Penry was aggressive, violent, manipulative, dangerous, and unremorseful. (*Id.*, pp. 1734-36). When asked if he believed Penry was likely to change, Dr. Samenow testified that "the prognosis would be pretty bleak." (*Id.*, p. 1736).

In his testimony during the sentencing phase of Penry's 1990 trial, Dr. Samenow made only one reference to a report from Dr. Peebles, who had examined Penry before his 1977 conviction for aggravated rape. Penry's counsel had requested that Dr. Peebles examine Penry. (S.F. Vol. 47, p. 1058). Dr. Samenow noted that Dr. Peebles' report reflected that Penry "on occasion, heard voices and saw things, but . . . he probably learned this at Rusk State Hospital and is using this as an excuse to cover up his offenses." (S.F. Vol. 50, p. 1729). Dr. Samenow then testified that "TDC Medical Records" showed that Penry had on occasion used his mental retardation as an excuse for violent or destructive behavior. (*Id.*, pp. 1730-31). Dr. Samenow testified that he had developed his diagnosis of Penry's antisocial personality from a review of "records" showing that Penry had a history of committing "anti-social acts" and a "broad range of criminal activity." (*Id.*, pp. 1731-32). Dr. Samenow testified that he based his conclusion that Penry's crimes were planned or premeditated from these same "records" and from Penry's "prior criminal and violent behavior." (*Id.*, pp. 1733-34). Dr. Samenow broadly referred to the "TDC

Medical Records" as supporting his opinion that Penry could exercise self-control; could act deliberately; was aggressive, violent, and manipulative; was capable of acting voluntarily; and was dangerous and unlikely to change. (*Id.*, pp. 1734-37).[12]

4. The Prosecutor's Use of Dr. Peebles' Report in Closing Argument

In closing argument, the prosecutor used Dr. Peebles' report to argue Penry's future dangerousness:

> In 1977, this man raped Diana Rearden. A few months later he was examined by Dr. Felix Pebbles [sic], who found that he was sane. He knew the difference between right and wrong, and he was competent to stand trial, but, Dr. Pebbles [sic], went on and made an additional finding that was really out of the ordinary, and I have never seen this in any kind of a report, he just added it, he said that it is my further professional opinion, that if Johnny Paul Penry were released from custody, that he would be dangerous to other persons.

(S.F. Vol. 51, pp. 1946-47).

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[12] Dr. Samenow's description of the records he reviewed in preparing to testify shows that Dr. Peebles' report was one of many documents that Dr. Samenow consulted. Dr. Samenow testified that he reviewed

> [t]he confession of the Defendant that was dated 1979, I believe, two of them. Information concerning 1977 rape conviction involving a Diana Koch. The Defendant's records from Austin State Hospital, University of Texas Medical Branch at Galveston, TDC Medical and Mental Health Records, Mental Health or records from the Polk County Mental Health and Mental Retardation Unit, records from the Mexia State School, records from the Texas Rehabilitation Commission, the Rusk State Hospital, the Goose Creek Independent School District, Competency and Insanity Examination by Dr. Kenneth A. Vogtsberger, TDC Disciplinary Records on this Defendant, both for his current incarceration and prior incarceration, I believe a Competency Trial Transcript. . . .

(S.F. Vol. 50, pp. 1715-16).

B. The Findings and Conclusions of the State Court

On Penry's direct appeal, the Texas Court of Criminal Appeals thoroughly discussed Penry's *Estelle v. Smith* claim and, applying the Supreme Court rulings in *Estelle* and *Buchanan*, rejected the claim. *Penry*, 903 S.W.2d at 757-60. As to the Sixth Amendment claim, the Texas court found that Penry's attorney was "on notice that if he intended to put on a 'mental status' defense, he would have to anticipate the use of psychological evidence by the prosecution in rebuttal." *Id.* at 758-59. The court also found that Penry was not examined for future dangerousness. Based on these findings, the Texas court concluded that there had been no Sixth Amendment violation.

As to Penry's Fifth Amendment claim, the Texas Court of Criminal Appeals found that the testimony of Dr. Fason, who did not testify regarding future dangerousness, was proper rebuttal testimony under *Buchanan*. The state court noted that Dr. Quijano had testified as to Penry's future dangerousness but did not base his opinion on his examination of Penry. *Id.* at 759. As to Dr.

Peebles' 1977 examination, the state court found that defense counsel had requested that examination and that during the 1990 trial, no expert witness referred to any testimonial statements contained in the Peebles report. *Id.* The state appellate court specifically found that Dr. Samenow and Dr. Quijano did not base their opinions regarding future dangerousness on Dr. Peebles' examination and report. *Id.* Based on these facts, the Texas court concluded that *Estelle* did not apply to Penry's trial and did not support his claim for relief. *Id.* The Texas court determined that Penry's claim regarding the prosecutor's closing argument was procedurally barred. *Id.* at 760.

This court finds that Penry has failed to rebut, by the necessary clear and convincing evidence, the presumption that the state court's factual findings are correct, as the AEDPA requires. The legal conclusions of the Texas Court of Criminal Appeals are neither contrary to, nor an unreasonable application of, clearly established federal law, and they are not based on an unreasonable determination of the facts in light of the evidence presented. This court DENIES Penry's request for federal habeas relief on his *Estelle v. Smith* claim.

C. Harmless Error Analysis

Even if this court rejected the Texas Court of Criminal Appeals' findings and concluded that Dr. Fason's testimony violated *Estelle v. Smith* to the extent that it went beyond rebutting the testimony Penry offered by providing an opinion as to future dangerousness, the error was harmless under *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993).

Under *Brecht*, a trial error of constitutional magnitude does not entitle a defendant to habeas relief unless the error " 'had a substantial or injurious effect or influence in determining the jury's verdict.' " *Id.* at 1722 (quoting *Kotteakos v. United States*, 66 S. Ct. 1239, 1253 (1946)); *see also Harris v. Warden, Louisiana State Penitentiary*, 152 F.3d 430, 437 (5th Cir. 1998); *Woods v. Johnson*, 75 F.3d at 1017, 1026-33 (5th Cir. 1996) (applying the *Brecht* standard to reject a petitioner's *Estelle* claim). In *Woods*, the Fifth Circuit found the prosecution's violation of *Estelle* to be harmless because the psychiatrist's testimony as to future dangerousness was "equivocating and weak"; the jury could not reasonably construe the psychiatrist's testimony as based on his examination of the defendant; and the prosecution primarily relied on other evidence of the defendant's future dangerousness. *Woods*, 75 F.3d at 1027, 1028-33. The *Woods* court found the psychiatrist's testimony to be "equivocating and weak" for two reasons. The psychiatrist admitted that behavioral scientists' efforts to predict future behavior were not very accurate. He also testified only that someone who had committed violent acts in the past was "more likely" to commit future violent acts. *Id.* at 1027.

Dr. Fason's direct testimony on Penry's future dangerousness was highly "equivocating and weak," so much so that it is debatable whether he even testified as to future dangerousness. Additionally, on cross-examination, Dr. Fason substantially limited the potential impact of his direct testimony. After Penry's counsel asked Dr. Fason if he would need longer than a twenty-minute examination to make a diagnosis of an antisocial personality, Dr. Fason answered that, although he would not

need additional time to make a "diagnosis," he would need significantly more time to make a prognosis as to the future and, indeed, could not make such a prognosis as a scientific opinion. (S.F. Vol. 46, p. 821). This testimony is similar to the psychiatrist's testimony in *Woods*, disclaiming an ability to predict the defendant's future dangerousness beyond a statement that someone with a past history of violent acts has a greater likelihood of committing future violence than a person with no prior violent conduct.

Dr. Fason's testimony on direct examination was less inflammatory than testimony presented in cases finding harmful error. *See Satterwhite v. Texas*, 108 S. Ct. 1792, 1799 (1988) (the psychologist testified that the defendant unequivocally "will present a continuing threat to society by continuing acts of violence," was "as severe a sociopath as you can be," and was "beyond the reach of psychiatric rehabilitation"); *Estelle*, 101 S. Ct. at 1871 (the psychologist testified that the defendant was a "very severe sociopath" who would "continue his previous behavior," whose sociopathic condition would "only get worse," and who would "go ahead and commit other similar or same criminal acts if given the opportunity to do so").

In addition, the record reflects that Dr. Fason's diagnosis drew primarily from sources other than his examination of Penry. Although Dr. Fason included the examination in his diagnosis, he disagreed that the diagnosis was made "on the basis of" the interview. (S.F. Vol. 46, p. 820). Dr. Fason had also reviewed Penry's "rather extensive" medical records in reaching his conclusions.

Dr. Fason testified on redirect examination that his diagnosis of Penry's antisocial personality was his "impression, diagnostic impression, and that is based on review of all of the records." (*Id.*, p. 829). *See Woods*, 75 F.3d at 1028-30 (the psychiatrist's limited opinion concerning the defendant's future dangerousness was based primarily on a hypothetical given by the prosecutor); *Savino v. Murray*, 82 F.3d 593, 605-06 (4th Cir. 1996) (finding harmless error when the expert "said he reviewed numerous outside materials" in diagnosing the defendant).

Finally, Dr. Fason's testimony was a very small part of the prosecution's evidence of Penry's future dangerousness. Two other experts, Drs. Quijano and Samenow, testified far more extensively and unequivocally than Dr. Fason that Penry would be a future danger. Dr. Quijano testified during the sentencing phase that Penry was "likely to engage in continuing acts of violence in the future." (S.F. Vol. 50, p. 1654). Dr. Samenow testified that the possibility that Penry's antisocial behavior would change "would be pretty bleak." (*Id.*, p. 1736). The prosecution also presented testimony during the sentencing phase from five prison guards and a deputy sheriff that Penry had committed violent and aggressive acts while in custody and had a reputation for being dangerous. Four of the prison guards specifically testified that they believed Penry would be a future danger. (S.F. Vol. 47, pp. 970, 983, 1008-09, 1157-60). The prosecution also presented Penry's 1977 aggravated rape conviction and testimony from the victim, as well as testimony from the woman Penry identified in his confession as someone he wanted to rape.

In his closing argument, the prosecutor relied far more heavily on evidence of Penry's dangerousness other than Dr. Fason's testimony. The prosecutor made only a brief reference to Dr. Fason's testimony to support his argument as to Penry's future dangerousness. *See Woods*, 75 F.3d at 1032 (noting that the objectionable references to the psychiatrist's testimony constituted less than ten percent of the prosecutor's closing argument).

The aggravated nature of Penry's crime, the inculpatory and remorseless statements in his confessions, and Penry's other violent acts, all supported the prosecution's future dangerousness argument. In *Woods*, the court found that admission of the psychiatrist's testimony was harmless error, in part because "[t]he real strength of the prosecution case on future dangerousness was the nature of the crime itself . . . coupled with the [previous] conviction and fifteen-year sentence for attempted aggravated rape." *Id.*; *see also Savino*, 82 F.3d at 605 ("At sentencing, the Commonwealth presented compelling evidence of Savino's prior criminal record and his own statements of his criminal history. The nature of the crime and the circumstances surrounding it certainly revealed viciousness and dangerousness.").

This court concludes that the admission of any testimony by Dr. Fason that could be characterized as evidence of Penry's future dangerousness did not have a "substantial and injurious effect" on the jury's verdict. Even if this court were to determine that Dr. Fason's testimony violated the Supreme Court's decision in *Estelle v. Smith*, the court would conclude that the error was harmless. The court DENIES Penry's *Estelle* claim.

VIII. The Exclusion of Evidence of Shirley Penry's Mental Illness (Claim VI)

During the sentencing phase of his retrial, Penry offered two hospital records documenting post-partum psychotic, schizophrenic behavior by Shirley Penry, Penry's mother. The trial court excluded the documents. (S.F. Vol. 49, pp. 1561-65). Penry argues that the trial court's exclusion of the evidence violated his constitutional rights by preventing the jury from hearing and considering relevant mitigating evidence.

The Court of Criminal Appeals upheld the trial court's exclusion of the evidence as irrelevant, finding that "the records did not discuss whether [Penry's] mother abused any of her children, or even whether her mental condition made it likely that she would abuse her children. There was no evidence that her psychological problems would have led to child abuse." *Penry*, 903 S.W.2d at 762. The determination by the state appellate court that the evidence was irrelevant is not an unreasonable application of clearly established federal law and cannot provide a basis for granting Penry federal habeas relief under the AEDPA.

A state trial court's ruling that the proffered testimony is inadmissible is entitled to deference by a federal habeas court. *See Panzavecchia v. Wainwright*, 658 F.2d 337, 340 (5th Cir. 1981) ("[F]ederal courts are compelled to defer to a state court's interpretation of its own criminal laws, rules of evidence and rules of criminal procedure." (citing *Spencer v. Texas*, 87 S. Ct. 648 (1967))); *see also Little v. Johnson*, 162 F.3d 855, 862 (5th Cir. 1998) ("[I]n habeas

actions, this court does not sit to review the mere admissibility of evidence under state law."); *Fuller v. Johnson*, 114 F.3d 491, 498 (5th Cir.), *cert. denied*, 118 S. Ct. 399 (1997). The Supreme Court has repeatedly declined to "fashion general evidentiary rules, under the guise of interpreting the Eighth Amendment, which would govern the admissibility of evidence at capital sentencing proceedings. . . . The Eighth Amendment does not establish a federal code of evidence to supersede state evidentiary rules in capital sentencing proceedings." *Romano v. Oklahoma*, 114 S. Ct. 2004, 2011 (1994). "[A] state trial court's evidentiary rulings will mandate habeas relief when errors are so extreme that they constitute a denial of fundamental fairness." *Little*, 162 F.3d at 862.

Applying these standards of review, this court concludes that the state court's evidentiary ruling does not provide a basis for the relief Penry seeks. To the extent Penry offered the evidence to support his claim that he was abused as a child, the Texas Court of Criminal Appeals correctly found that Penry's mother's medical records did not relate specifically to the child abuse issue. To the extent Penry offered the evidence to rebut testimony by Dr. Samenow, the proffered evidence was not proper rebuttal because Dr. Samenow acknowledged that Shirley Penry had "serious problems of her own." (S.F. Vol. 50, p. 1763)

Penry asserts that, even if the proffered evidence is otherwise inadmissible under Texas law, the state court's ruling violates his constitutional rights, citing *Buchanan v. Angelone*, 118 S. Ct. 757 (1998), *Eddings v. Oklahoma*, 102 S. Ct. 869 (1982), and *Lockett v. Ohio*, 98 S. Ct. 2954 (1978). A capital defendant may offer as mitigating evidence

"any aspect of [his] character or record and any of the circumstances of the offense that [he] proffers as a basis for a sentence less than death." *Lockett*, 98 S. Ct. at 2964. The Supreme Court has "emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individual determination [in capital sentencing proceedings]." *Buchanan*, 118 S. Ct. at 761. The sentencing jury cannot be precluded from considering relevant mitigating evidence. *Eddings*, 102 S. Ct. at 876-77. The Supreme Court requires that the proffered mitigating evidence be relevant.

Relevant mitigating evidence of a defendant's background must be causally connected to the articulated reason for the defendant's reduced culpability. *See Lincecum v. Collins*, 958 F.2d 1271, 1284 (5th Cir. 1992) (holding that the petitioner's evidence that as a child he had been left to live with his aunt was not mitigating evidence because the petitioner did not show that these circumstances "produced such a turbulent and unsteady family situation that [the defendant] suffered from emotional problems which would reduce his moral culpability for his crime"); *Graham v. Collins*, 950 F.2d 1009, 1033 (5th Cir. 1992) (en banc) (holding that evidence of the petitioner's mother's frequent hospitalizations for mental illness was not proper mitigating evidence because the petitioner did not present "evidence of *any* effect this had on [him], or of any reaction on his part to it"), *aff'd*, 113 S. Ct. 892 (1993).

The state trial court did not preclude Penry from introducing relevant mitigating evidence. Penry introduced significant and extensive evidence showing the abuse his mother inflicted on him, beginning when he

was an infant and continuing throughout his childhood. Penry also introduced substantial evidence of Shirley Penry's mental illness and violent tendencies. Penry's sister testified that Shirley Penry had "mental problems." (S.F. Vol. 48, p. 1122). Penry's aunt, Lucille Anderson, told the jury that Shirley Penry physically attacked her. (*Id.*, p. 1169). Billie Johnson, a neighbor when Penry was a child, testified that Shirley Penry "wasn't friendly. When I was in my back yard and she was in her yard, she would lift her dress on both sides with her hand and dance around the yard singing old lady Johnson, old lady Johnson, and I just ignored her." (*Id.*, p. 1252). Shirley Penry's sister, Marilyn Barnet, testified that Shirley Penry exhibited "evidence of mental illness" on "quite of few occasions," including an attempt to burn Barnet's house down. (*Id.*, p. 1264). Barnet also told the jury that Shirley Penry had "pulled knives" on her, (*id.*, p. 1275); that Shirley Penry's husband had said he was "afraid of "his wife, (*id.*, p. 1271); and that Barnet herself was afraid of Shirley Penry. (*Id.*, p. 1275).

Penry also introduced evidence that specifically referred to the episodes of Shirley Penry's mental illness described in the excluded documents. Penry introduced a document from the Mexia State School, which Penry attended as a child, which reflected that after Penry's birth Shirley Penry had "suffered a post-partum psychosis" and had resided in the "Oklahoma State Hospital for ten months." (S.F. Vol. 49, p. 1571). Lucille Anderson testified that after Penry's birth, Shirley Penry "had to be put in a mental hospital." (S.F. Vol. 48, p. 1163; *see also id.*, pp. 1189, 1191). Another aunt, Patsy Ross, testified that Shirley Penry had "a nervous breakdown" after Penry's

birth and required hospitalization. (*Id.*, p. 1242). Dr. Quijano referred to a document that made reference to Shirley Penry's "post-partum psychosis." (S.F. Vol. 50, p. 1691).

The record clearly establishes that the trial court did not prevent the jury from hearing and considering relevant mitigating evidence regarding Penry's childhood abuse inflicted by his mother, who suffered from mental illness. The trial court required that the evidence be "presented in a form acceptable to the law of evidence before [Penry] is entitled to insist that it be received over objection." *See Lewis v. State*, 815 S.W.2d 560, 568 (Tex. Crim. App. 1991), *cert. denied sub nom., Lewis v. Texas*, 112 S. Ct. 1296 (1992).

Additionally, even if this court concluded that the trial court's exclusion of medical records from Shirley Penry's psychotic episodes in 1956 and 1963 was erroneous, the trial court's ruling did not have a "substantial and injurious effect" on the jury's verdict. *Brecht*, 113 S. Ct. at 1722; *see also United States v. Washington*, 106 F.3d 983, 1000 (D.C. Cir. 1997) (holding that the trial court's exclusion of evidence relating to the defendant's good character was harmless error under *Brecht* because the evidence was cumulative of other character evidence). The jury heard substantial evidence about the abuse Penry suffered as a child. The jury also heard extensive evidence regarding Shirley Penry's mental illness and violent behavior, including evidence of her post-partum psychosis; her "violent episodes"; her attack on Penry's aunt; her attempt to burn down her sister's house; her "pulling knives" on her sister; her bizarre behaviors; and

the fact that her husband and her sister were "afraid" of her.

This court DENIES Penry's claim for federal habeas relief based on the trial court's exclusion from evidence of his mother's medical records.

IX. The State's Failure to Administer Penry's Anti-Psychotic Medicine (Claim VII)

Penry argues that the prosecution violated *Brady v. Maryland*, 83 S. Ct. 1194 (1963), by failing to disclose to Penry's counsel that Penry was not administered his prescribed anti-psychotic and anti-depressant medication during his competency trial. Penry argues that the prosecution violated *Giglio v. United States*, 92 S. Ct. 763 (1972), when it elicited false testimony from a Texas Department of Corrections[13] physician regarding Penry's medication schedule. Penry also appears to argue that the denial of his anti-psychotic medication violated *Riggins v. Nevada*, 112 S. Ct. 1810 (1992).

Penry raised these three claims in his state habeas petition. The state habeas court held an evidentiary hearing on the claims on July 3, 1997. The habeas court issued findings of fact and conclusions of law in an order filed on September 23, 1997.[14] (Findings of Fact, Conclusions of

[13] The Texas Department of Criminal Justice (TDCJ) was formerly known as the Texas Department of Corrections (TDC).

[14] Penry argues that the state court findings of fact are *per se* unreasonable because much of the state court's findings of fact are a verbatim recitation of the State's proposed findings of fact. The Texas Code of Criminal Procedure requires only that the

Law and Order, *Ex parte Penry*, No. 71,120) ("*Findings and Conclusions*") (found at S.H. Vol. 4, pp. 141-95)). The Texas Court of Criminal Appeals affirmed the habeas court's findings of fact and conclusions of law, without opinion.

The state habeas court found that on April 2, 1990, Penry's medicine schedule was changed to include two doses of the anti-psychotic drug Triavil, to be administered together "p.m." (*Findings and Conclusions*, p. 7). Penry's Triavil prescription was continued on April 26, 1990. (*Id.*, p. 8). Jury selection in Penry's competency trial began on May 7, 1990. On May 16, 1990, the jury found Penry competent to stand trial. The habeas court found that Penry's medical records, which listed the date and time that Penry was administered each of several prescription drugs, did not indicate that Penry had been administered Triavil from May 7 through 12, 1990, and on May 14 and 16, 1990. (*Id.*, p. 11). The medical records did reflect that Penry had been administered Triavil on each of the other days in May 1990, "except as otherwise

state habeas court make "written findings of fact . . . [and] conclusions of law." Tex. Code Crim. Proc. art. 11.071 § 9(e). The Texas Code of Criminal Procedure does not prohibit the state court from adopting the State's proposed findings of fact. *See Nichols v. Scott*, 69 F.3d 1255, 1277 (5th Cir. 1995); *Cockrum ex rel. Welch v. Johnson*, 934 F. Supp. 1417, 1427 (E.D. Tex. 1996) (noting that the state court's "adoption of findings prepared by the State's attorney, and the concomitant deference to her research, is not objectionable, although it is certainly not laudable"), *rev'd on other grounds*, 119 F.3d 297 (5th Cir. 1997). To gain relief, the AEDPA requires Penry to show by clear and convincing evidence that the state court's factual determinations are unreasonable in light of the evidence, regardless of the format in which the state court issues its findings of fact.

noted." (*Id.*). The habeas court found that at no time before or during Penry's competency trial did Penry's counsel object to the administration of Triavil or object to the State's alleged failure to administer Triavil on the above dates. (*Id.*, p. 12).

A. The *Brady* Claim

The state habeas court assumed that Penry had not received Triavil on the questioned dates. The court concluded that the prosecution's failure to inform Penry's counsel of the prison's apparent failure to provide Penry his prescribed medication did not violate *Brady*. The state habeas court reasoned that: (1) the prosecution was not aware that Penry had not received Triavil; (2) Penry himself was aware that he had not received Triavil and could have informed his counsel of this fact; and (3) Penry's counsel could have discovered this fact by the exercise of reasonable diligence. (*Id.*, p. 18). The state habeas court held that the undisclosed evidence was not favorable to Penry because the failure to administer Triavil would have made Penry appear *less* competent. (*Id.*, p. 21). The court also held that the evidence was not material to Penry's claim of incompetence. Because Penry's dosage of Triavil was not enough to have altered Penry's competency to stand trial, there was not a reasonable probability that had the information been disclosed to the defense, the outcome of the competency trial would have been different. (*Id.*, p. 22).

To establish a claim under *Brady*, Penry must show that "(1) the prosecutor suppressed or withheld evidence (2) which was favorable and (3) material to the defense."

Castillo v. Johnson, 141 F.3d 218, 222 (5th Cir. 1998). The courts have held that the prosecution does not violate *Brady* when the defendant already knew about the allegedly withheld evidence or could have obtained it through the exercise of reasonable diligence. *Id.* at 223 (citing *Brown v. Cain*, 104 F.3d 744, 750 (5th Cir.), *cert. denied*, 117 S. Ct. 1489 (1997)). In this case, the state habeas court reasonably found that Penry would have been aware that he did not receive Triavil on the relevant dates. *Cf. id.* (rejecting the petitioner's *Brady* claim that the prosecution withheld evidence of his "intoxication and drug abuse history"); *West v. Johnson*, 92 F.3d 1385, 1398-99 (5th Cir. 1996) (rejecting the petitioner's *Brady* claim that the prosecution withheld evidence that his confession of stealing a necklace was fabricated), *cert. denied*, 117 S. Ct. 1847 (1997).

Penry argues that his mental retardation may have prevented him from informing his counsel that his Triavil had been withheld. A careful reading of the record does not support this argument. A jury found Penry competent to stand trial, finding that Penry had the "capacity to understand the nature and object of the proceedings against him, to *consult with counsel, and to assist in preparing his defense.*" *Drope v. Missouri*, 95 S. Ct. 896, 903 (1975) (emphasis added). Penry has not presented evidence to rebut the court's factual determination that Penry could have told his lawyers of the interruption in his medication.

The state habeas court also held that the prosecution did not violate *Brady* because the prosecution was not aware of the interruption in Penry's Triavil dosage. Penry does not dispute that the prosecution was subjectively

unaware of the interruption. However, Penry argues that the TDC medical personnel who would have been aware of the interruption were acting on the government's behalf.

A prosecutor "has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case." *Kyles v. Whitley*, 115 S. Ct. 1555, 1567 (1995). Courts have interpreted *Kyles* to apply only to "others" who aid the government's *investigation* of the case against the defendant. *See United States v. Avellino*, 136 F.3d 249, 255-56 (2d Cir. 1998); *United States v. Morris*, 80 F.3d 1151, 1169 (7th Cir. 1996); *see also Smith v. Secretary of New Mexico Dept. of Corrections*, 50 F.3d 801, 824 (10th Cir. 1995) ("[T]he 'prosecution' for *Brady* purposes encompasses not only the individual prosecutor handling the case, but also extends to the prosecutor's entire office, as well as law enforcement personnel and other arms of the state involved in *investigative* aspects of a particular criminal venture.") (citation and footnote omitted) (emphasis added). The evidence presented at the evidentiary hearing did not show that TDC medical personnel were involved in the prosecution's preparation for Penry's competency trial. TDC medical personnel did not testify on behalf of the prosecution at Penry's competency trial. There is no evidence that Penry's medication schedule was a part of the State's case in the competency trial. The state habeas court's ruling that the prosecution did not violate *Brady* because the prosecutor was unaware of the interruption in the administration of Penry's Triavil was not an unreasonable application of federal law.

The state habeas court also found that evidence of the medication interruption would not have been favorable

to Penry under *Brady*'s second prong. The state court cited testimony from Dr. Mount, a psychologist who testified for Penry at the competency trial, that psychotropic drugs such as Triavil would "make the person appear to function more normally" and "appear competent." (S.F. Vol. 11, p. 758-59). Other evidence presented at the competency hearing regarding the effect of a withdrawal of Triavil supports the state habeas court's ruling. In response to questioning from Penry's counsel, Dr. Quijano testified as follows:

> Q: The effect of the psychotropic drugs, that is taken even as we appear here now, is obviously going to have some effect to calm him down and bring his conduct within what we regard as normal, isn't it?
>
> A: Yes. That would have some effect.

(S.F. Vol. 12, p. 962).

Witnesses at the state habeas evidentiary hearing on July 3, 1997 offered consistent and similar testimony. Dr. Edward Gripon, a psychiatrist, testified that Triavil would help to "control [Penry's] behavior" and "would tend to help [Penry] to be a little more relaxed." (S.H. Vol. 1, p. 34). Dr. Gripon also testified that Triavil "might help [Penry] to be somewhat calmer and get a better nights rest." (*Id.*). Dr. Gripon testified that an abrupt cessation of Triavil could potentially result in "the recurrence of whatever symptoms that medication were offsetting. . . . " (*Id.*, p. 44).

> Q: And if they were psychotic, the psychosis would return?

> A: If they were psychotic before and this small of a dose of Triavil would offset that, then at some point in time it could return. You can't predict with medical probability that it would return in that six day window . . . but [it] could return in the absence of the medicine if the medicine effectively intended to improve that, yes.

(*Id.*, pp. 44-45). Although Dr. Gripon testified that a cessation of Triavil might not result in a noticeable effect on Penry's behavior, he clearly did not testify that a cessation would have such a *positive* effect that the jury would have mistakenly thought Penry was competent.

Dr. Jonathan Lipman, a neuropharmacologist, testified that a cessation of Triavil could result in a return of the patient's psychosis and a "psychotic episode." (*Id.*, p. 135). Dr. Lipman testified that a sudden withdrawal from Triavil could have noticeable effects, including "intense levels of anxiety and agitation." (*Id.*, p. 136).

The state habeas court's finding that the withdrawal of Triavil would, at most, have made Penry appear *less* competent was not an unreasonable determination of the facts in light of the evidence. The state court's conclusion that the interruption of Penry's Triavil medication during his competency trial was not evidence favorable to Penry was not an unreasonable application of clearly established federal law.

This court DENIES Penry's *Brady* claim.[15]

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[15] Penry also argues that the July 3, 1997 state habeas hearing was inadequate because the state court unreasonably limited his pre-hearing discovery. 28 U.S.C. § 2254(e)(1) provides that state court factual determinations are presumed to be correct. Penry must rebut this presumption by clear and convincing evidence. *Id.* Penry has not presented clear and convincing evidence that additional discovery would have altered the state court's findings of fact. The evidence presented at the July 3, 1997 hearing overwhelmingly supported the state court's finding that if the interruption in Penry's medication had any short-term effect, it would be to make Penry appear less competent. Penry does not identify another basis for concluding that the state court's limitation on his discovery was unreasonable.

B. The *Giglio* Claim

The state habeas court, following an evidentiary hearing, rejected Penry's *Giglio* claim. The court found that the prosecutor had elicited false testimony from Penry's expert psychologist, Dr. George Mount, that at the time of the competency trial, Penry was prescribed only one pill to help him sleep. However, the court held that the factual error was immaterial to the issue of Penry's competency and that the prosecution did not know that Dr. Mount's testimony was false. (*Findings and Conclusions*, pp. 33-36).

To prove that the prosecution violated his due process rights under *Giglio*, Penry must show that: (1) false testimony was presented at trial; (2) the prosecution had actual knowledge that the testimony was false; and (3) the testimony was material. *Carter v. Johnson*, 131 F.3d 452, 458 (5th Cir. 1997).[16] Penry contends that the

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[16] Penry asserts that the State violates *Giglio* if it "should have known" that it was eliciting false testimony. The Fifth Circuit cases require that the State have actual, subjective knowledge of the falsity of the testimony to violate *Giglio*. *See*,

prosecution elicited the following false testimony from Dr. Mount in cross-examination on May 14, 1990:

> Q: Okay. Did you notice [in Penry's medical records] the dosages?
>
> A: I didn't notice them.
>
> Q: Did you notice that he is only given one tablet a day and that is at night to sleep?
>
> A: I do recall some of that.

(S.F. Vol. 11, pp. 760-61). Penry argues that this testimony was false because his medical records reflect a prescription for one dosage each of Triavil 4/50, Triavil 2/10, and Cogentin per day and because these drugs were anti-psychotic and anti-depressant medication that did more than merely enable Penry to sleep.

The state habeas court found that Dr. Mount's testimony was false, but also found that the district attorney who elicited the testimony had no knowledge of its falsity. The state court relied on an affidavit submitted by the district attorney, who stated that in preparing for the competency trial, he had inadvertently relied on an incomplete set of Penry's medical records. (*Findings and Conclusions*, p. 34). Penry does not challenge this statement. Because the district attorney was mistaken as to Penry's medication schedule, he would not have known that Dr. Mount was incorrect in concurring that Penry was given more than one dosage of medicine daily.

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e.g., United States v. OKeefe, 128 F.3d 885, 893 (5th Cir. 1997); *Fuller v. Johnson*, 114 F.3d 491, 496 (5th Cir. 1997).

The state court's finding that the prosecution did not have subjective knowledge of the falsity of Dr. Mount's testimony is presumed correct and was not unreasonable. This court DENIES Penry's *Giglio* claim.

C. The *Riggins* Claim

The state habeas court rejected Penry's *Riggins* claim, finding that Penry had not objected to the State's administration of Triavil and that the interruptions in the administration of Triavil had not occurred during the guilt/innocence phase of Penry's trial. (*Id.*, pp. 37-38). The Texas Court of Criminal Appeals affirmed without an opinion.

In *Riggins*, the Supreme Court held that the State's involuntary administration of antipsychotic drugs to the petitioner during the guilt/innocence and sentencing phases of his capital murder trial violated his due process rights. *Riggins*, 112 S. Ct. at 1815. The Court stated that administration of the medication might not have violated the petitioner's rights if the State had established that petitioner needed the drugs and that the drugs were medically appropriate. *Id.*

Penry does not state the factual basis for his *Riggins* claim. The state court denied Penry's *Riggins* claim in part because, unlike the petitioner in *Riggins*, Penry did not move the trial court to suspend the administration of his medication. The *Riggins* decision was clearly predicated on the involuntary nature of the administration of the medication. "[F]orcing antipsychotic drugs on a convicted prisoner is impermissible absent a finding of overriding justification and a determination of medical

appropriateness." *Id.* Penry did not object to the administration of the medicine and there is no evidence that it was administered involuntarily.

The state court reasonably found that the State did not violate Penry's rights under *Riggins*. *See Adanandus v. Johnson*, 947 F. Supp. 1021, 1083-84 (W.D. Tex. 1996) (rejecting the petitioner's *Riggins* claim because petitioner did not allege that he had been forcibly or involuntarily medicated). This court DENIES Penry's *Riggins* claim.

X. Penry's Claim That His Execution After Eighteen Years on Death Row Would Violate the Eighth Amendment (Claim VIII)

Penry argues that the eighteen-year delay since the imposition of his first death sentence has caused him "psychological torture" that violates the Eighth Amendment. Penry also argues that his execution would violate the Eighth Amendment because it would no longer serve the State's interest in either deterrence or retribution.

Penry raised these claims in his state habeas petition. The state habeas court denied the claims, holding that (1) the State of Texas did not unreasonably delay in carrying out the death sentence; (2) an eighteen-year period between sentencing and execution does not violate the Eighth Amendment; (3) Penry's execution would not have been considered cruel and unusual at the time the Bill of Rights was adopted; and (4) Penry's execution does not offend evolving standards of decency. (*Findings and Conclusions*, pp. 41-46). The Court of Criminal Appeals affirmed the trial court's findings and conclusions.

The state court's rulings were not contrary to clearly established federal law, as determined by the Supreme Court. Penry does not challenge the state court's ruling that his execution would not have been considered cruel and unusual at the time the Bill of Rights was adopted. Penry does not cite Supreme Court or circuit court precedent holding that "psychological torture" caused by an eighteen-year stay on death row, and repeated setting of execution dates, so offends "evolving standards of decency" as to violate the Constitution. The Fifth Circuit has explicitly rejected this argument. *See White v. Johnson*, 79 F.3d 432, 439 (5th Cir. 1996).

Penry cites Justice Stevens' dissent from the denial of *certiorari* in *Lackey v. Texas*, 115 S. Ct. 1421 (1995) (Stevens, J., dissenting from denial of *certiorari*), and *Gregg v. Georgia*, 96 S. Ct. 2909 (1976), as Supreme Court precedent supporting the proposition that a petitioner's execution after eighteen years on death row is cruel and unusual punishment because it can no longer serve a deterrent or retributive function. The circuit courts have repeatedly rejected such an extension of *Gregg* sought by petitioners whose stays on death row rival or exceed Penry's. *See, e.g., Carter*, 131 F.3d at 466 (a delay of fourteen years between sentencing and execution); *Lackey v Johnson*, 83 F.3d 116, 117 (5th Cir. 1996) (a delay of seventeen years); *White*, 79 F.3d at 439-40 (a delay of seventeen years); *Stafford v. Ward*, 59 F.3d 1025, 1028 (10th Cir. 1995) (a delay of fifteen years); *McKenzie v. Day*, 57 F.3d 1461, 1467-68 (9th Cir. 1995) (a delay of twenty years); *Lackey v. Scott*, 52 F.3d 98, 100 (5th Cir. 1995) (a delay of sixteen years); *Free v. Peters*, 50 F.3d 1362, 1362 (7th Cir. 1995) (a delay of over fifteen years).

Penry seeks to distinguish these precedents by arguing that his stay on death row presents unique factors. Penry requests an opportunity to conduct factfinding and discovery with respect to this claim. However, the facts Penry argues he should have the opportunity to try to prove – that the psychological harm caused by a lengthy stay on death row and threat of execution violates evolving standards of decency, and that an eighteen-year delay between sentencing and execution does not serve a deterrent or retributive function – are the same types of facts considered in earlier cases. The courts in these cases rejected the argument that a stay on death row as long as Penry's, involving similar factors, yields a cognizable Eighth Amendment claim. As the Fifth Circuit noted in *White*:

> [T]here are compelling justifications for the delay between conviction and the execution of a death sentence. The state's interest in deterrence and swift punishment must compete with its interest in insuring that those who are executed receive fair trials with constitutionally mandated safeguards. As a result, states allow prisoners such as White to challenge their convictions for years. White has benefitted from this careful and meticulous process and cannot now complain that the expensive and laborious process of habeas corpus appeals which exists to protect him has violated other of his rights.

White, 79 F.3d at 439; *see also Stafford*, 59 F.3d at 1028 (refusing to find the petitioner's claim cognizable under the Eighth Amendment despite the fact that he had faced seven execution dates in his fifteen years on death row).

Penry has not made the required showing for an evidentiary hearing under 28 U.S.C. § 2254(e)(2).

Courts have also held that such claims are not cognizable when, as here, the petitioner has availed himself of the appeals process during the delay. *See, e.g., White*, 79 F.3d at 439; *McKenzie*, 57 F.3d at 1466-67 ("The delay has been caused by the fact that McKenzie has availed himself of procedures our law provides. . . . "); *Fearance v. Scott*, 56 F.3d 633, 639 (5th Cir. 1995) ("[A]t every turn, [defendant], without complaining about the accumulating period on death row, sought extensions of time, hearings and reconsiderations."); *Free*, 50 F.3d at 1362 (noting that most of defendant's time on death row "resulted from [his] pursuit of his discretionary appeals in both state and federal court"). Penry offers no evidence that he moved to expedite review of his appeals. Although Penry argues that his case is different because he spent approximately ten years on death row under a death sentence ultimately deemed unconstitutional, the cases do not support the argument that a delay resulting from a successful habeas challenge would make a subsequent conviction and death sentence unconstitutional. In *White*, the petitioner's death sentence was vacated approximately three years after a conviction that followed a successful federal habeas challenge. 79 F.3d at 436. In *Lackey*, the petitioner's first capital murder conviction and death sentence were reversed on direct appeal approximately five years after the conviction. 52 F.3d at 99. However, neither the *White* court nor the *Lackey* court granted habeas relief based on the petitioners' claims that the protracted length of their stays on death row was unconstitutional.

The state habeas court's adjudication of the merits of Penry's claim of delay is neither contrary to, nor an unreasonable application of, clearly established federal law and is not based on an unreasonable factual determination based on the evidence presented. This court DENIES Penry's claim that his execution after eighteen years on death row would violate the Eighth Amendment.

XI. Penry's Claims Regarding His Confessions (Claim IX)

Penry alleges that the trial court's admission, over objection, of his two confessions, violated his constitutional rights under *Miranda v. Arizona*, 86 S. Ct. 1602 (1966). Specifically, Penry argues that he did not "intelligently" waive his rights under *Miranda* and did not receive effective Miranda warnings.

The Texas Court of Criminal Appeals fully addressed this claim on direct appeal. *Penry*, 903 S.W.2d at 744-50. The Texas appellate court ruled that the trial court did not err in failing to define "intelligently"; that Penry did not object to the trial court's failure to define "warn" and therefore had procedurally defaulted that claim; that the trial court did not err in failing to include an instruction that the officers must have "effectively communicated" the *Miranda* warnings; and that the trial court did not err in failing to suppress Penry's confessions. *Id.* at 745-48.

A. Respondent's Procedural Arguments

Respondent initially argues that Penry's *Miranda* claim is barred by 28 U.S.C. § 2244(b) as a "second or successive" petition and/or by the law of the case doctrine.

In his first federal habeas petition, Penry claimed that the trial court erred in failing to suppress his confessions because Penry gave them involuntarily and because Penry did not knowingly and intelligently waive his *Miranda* rights. *See* Order Denying First Amended Petition for Writ of Habeas Corpus and Dissolving Stay of Execution, *Penry v. McCotter*, No. L-86-89-CA, at 29-40 (E. D. Tex. 1987); *Penry v. Lynaugh*, 832 F.2d 915, 918 (5th Cir. 1987). In that petition, Penry did not present any claims that the trial court gave an incorrect jury instruction concerning the confessions. Respondent argues that each of Penry's claims is barred as an abuse of the writ. Penry's pending petition is not a "second or successive" petition subject to the restrictions of 28 U.S.C. § 2244(b), because it attacks his second conviction and sentence. *See, e.g., Esposito v. United States*, 135 F.3d 111, 113 (2d Cir. 1997); *Pratt v. United States*, 129 F.3d 54, 62 (1st Cir. 1997); *Palmer v. Clarke*, 961 F.2d 771, 774-75 (8th Cir. 1992). Respondent's argument fails.

Respondent alternatively argues that this court may not reach the merits of Penry's voluntariness and waiver claims under the law of the case doctrine. The law of the case bars this court's consideration of an issue previously decided by a court in this case. *United States v. Mendez*, 102 F.3d 126, 131 (5th Cir. 1996). In *Penry v. Lynaugh*, the Fifth Circuit considered and rejected Penry's claims. The

court described Penry's claims as follows: "Penry also argues that his confession was involuntary and that he did not voluntarily waive his *Miranda* rights. Most of Penry's argument on both issues centers on his low intellect and inability to freely confess or waive his rights." *Penry v. Lynaugh*, 832 F.2d at 918. In his brief to the Fifth Circuit, Penry argued that his mental retardation made him susceptible to suggestion and prevented him from appreciating the consequences of a waiver. Brief for the Petitioner-Appellant at 40-42, *Penry v. Lynaugh*, 832 F.2d 915 (5th Cir. 1987) (No. 87-2466) (citing *Jurek v. Estelle*, 623 F.2d 929, 937 (5th Cir. 1980); *Cooper v. Griffin*, 455 F.2d 1142, 1146 (5th Cir. 1972)).

The law of the case doctrine applies to Penry's voluntariness and waiver claims. However, a court may decline to apply the law of the case doctrine if evidence in a subsequent appeal is "substantially different" than that considered by the first court to rule on the issue, or if "controlling authority has since made a contrary decision of the law" applicable to the issues. *Society of the Roman Catholic Church of the Diocese of Lafayette, Inc. v. Interstate Fire & Cas. Co.*, 126 F.3d 727, 735 (5th Cir. 1997). Penry argues that in his 1990 suppression hearing, he presented new evidence that the officers who read him his *Miranda* rights were aware of his low intelligence. However, the officers testified that despite their awareness of Penry's low intelligence, they believed that he understood the warnings and the consequences of waiving his rights. Moreover, as more fully discussed below, the officers' subjective perception of Penry's level of intelligence does not determine whether his confession or waiver was voluntary, intelligent, and knowing.

In addition, Penry does not identify a controlling "contrary decision of the law" that would result in a different Fifth Circuit ruling. In this appeal, Penry bases his argument on *Miranda v. Arizona*, 86 S. Ct. 1602 (1966) and *Moran v. Burbine*, 106 S. Ct. 1135 (1986), cases already decided in 1987, when the Fifth Circuit rejected Penry's claim. Penry does not fall within the exceptions to the law of the case doctrine.

Respondent argues that Penry's claims regarding the jury instructions are barred by *Pratt* because Penry had the "incentive and ability" to raise them in his first habeas petition, but did not. This court does not read *Pratt* to bar consideration of Penry's jury instruction claims. Approximately twelve years have passed since Penry filed his first federal habeas petition. Fifth Amendment case law has been refined in those twelve years. Applying *Pratt* to bar this court's consideration of Penry's jury instruction claims would deprive Penry of the opportunity to argue that the last twelve years of Fifth Amendment jurisprudence provide a basis for his claims. This court will address the merits of Penry's jury instruction claims. Although not required to do so, this court will also address the merits of Penry's claims relating to the voluntariness of Penry's confessions and his waiver of his *Miranda* rights.

B. The Factual Background

The state trial court held pretrial suppression hearings before Penry's 1980 trial and before the 1990 retrial. At the 1990 hearing, the trial court heard testimony from four law enforcement officers, each of whom had testified

at the 1980 hearing. The state court also heard testimony from a psychologist presented by Penry. The trial court took judicial notice of the transcript of the 1980 suppression hearing, the testimony by Dr. Peebles from Penry's 1980 trial, and the 1980 finding that Penry was competent to stand trial. (S.F. Vol. 5, pp. 305-06). The record of both hearings establishes the following facts relevant to the circumstances under which Penry gave the two written confessions he challenges here.

On the morning of October 25, 1979, Officer Nelson heard a report on his police radio giving the description that Pamela Carpenter had provided of her attacker. Nelson believed that Penry matched the description of the attacker. Nelson went to Penry's father's house and asked Penry to accompany him to the Livingston police station. At the station, Ted Everitt, an investigator with the Polk County district attorney's office, read Penry his *Miranda* warnings. (1990 S.F. Vol. 5, p. 68). Everitt asked Penry if he understood the warnings; Penry answered "yes" and nodded his head. (*Id.*, p. 74). Everitt did not ask Penry to explain his understanding of the warnings. (*Id.*, p. 98). Everitt did not define any of the terms of the warnings. (*Id.*, p. 78). Everitt did not know whether Penry was "mentally normal," (*id.*, p. 76), but did not have the impression that Penry was "stupid or something." (Id., p. 97). Everitt did not know whether Penry could read or write. (*Id.*, p. 70). Based on his exchange with Penry, Everitt believed that Penry had understood the *Miranda* warnings. (*Id.*, p. 98).

The officers later took Penry to the murder scene. At the scene, Penry told Nelson that he "want[ed] to tell [Nelson] the truth about it." (1980 S.F. Vol. 4, p. 152).

Deputy Bob Grissom who was with Penry and Nelson, then read Penry the *Miranda* warnings again. Grissom asked Penry if he understood each of his rights. Penry answered "yes" and nodded his head. (1990 S.F. Vol. 5, p. 23). Grissom did not ask Penry to explain his answer and did not further inquire into Penry's understanding of the warnings. (*Id.*, pp. 23-24). After receiving the warnings, Penry confessed to the crime. Nelson testified that he considered Penry to be of "normal intelligence" and to have a "normal IQ." (*Id.*, pp. 28, 38). Nelson did not know whether Penry could read or write. (*Id.*, p. 27).

The officers took Penry back to the police station. The officers filled out a written complaint charging Penry with the capital murder of Pamela Carpenter. Penry appeared before Justice of the Peace Garnet Galloway, who read Penry the "magistrate's warnings," which are substantially similar to *Miranda* warnings.[17] Judge

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[17] The Justice of the Peace read the following warnings to Penry:

> (1) You are charged with the offense of Capital Murder. . . .
>
> (2) You have a right to hire a lawyer and have him present prior to and during any interview and questioning by peace officers or attorneys representing the State. If you are too poor to afford a lawyer, you have the right to request the appointment of a lawyer to be present prior to and during any such interview and questioning. You may have reasonable time and opportunity to consult your lawyer if you desire.
>
> (3) You have the right to remain silent.

Galloway asked Penry if he understood the rights; Penry said that he did. (1980 S.F. Vol. 4, p. 205). In front of the magistrate, Penry's father read Penry the *Miranda* warnings. Penry's father asked Penry if "he did it." (*Id.*, p. 184). Penry answered "yes." (*Id.*).

William Smith, the police chief in Livingston, Texas, asked Penry to give a statement at the police station about the crime. Penry agreed. Smith read Penry his *Miranda* rights. Smith testified that Penry did not "appear to have any difficulty in understanding anything" that Smith said to Penry. (1990 S.F. Vol. 5, p. 108). Smith testified that he believed Penry "understood what I was saying to him and he responded with a good answer." (*Id.*, p. 120). Smith believed that Penry was of "normal intelligence." (*Id.*). Smith did not ask Penry to explain what the warnings meant. (*Id.*, p. 120). Smith also testified that Penry "was able to recite the occurrences that appear in this statement easily." (1980 S.F. Vol. 4, p. 194).

Smith transcribed the first of Penry's written confessions. (1990 S.F. Vol. 5, p. 111). Immediately before taking Penry's statement, Smith learned that Penry could not read or write. (*Id.*, p. 126). This information did not affect Smith's opinion that Penry was not mentally retarded. (*Id.*, p. 140). After Smith took the statement, Smith read

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(4) You are not required to make a statement, and any statement you make can and may be used against you in Court.

(5) You have the right to stop any interview or questioning at any time.

(6) You have the right to have an examining trial.

(1990 Jury Trial; State's Exhibit No. 44).

the statement back to Penry and asked if "that was his statement." (*Id.*, p. 126). The officers then brought two citizens "in off the street" to read the statement aloud to Penry. (*Id.*). Before the citizens read the statement, Smith again read Penry the *Miranda* warnings. (*Id.*, p. 133).

On October 26, 1979, Maurice Cook, a Texas Ranger, took a second written confession from Penry. At approximately 10:00 a.m., Cook read Penry the statutory *Miranda* warnings. Before he read Penry the warnings, Cook knew that Penry could not read or write. (*Id.*, p. 158). Cook thought that Penry's intelligence level "was less than mine, and less than a lot of people." (*Id.*). Cook testified that he "probably" had learned before the interview that Penry was considered a "slow learner." (*Id.*, p. 173). Cook testified that he read the warnings "with extra precaution" and "br[oke] [the warnings] down and explain[ed] it to him." (*Id.*, p. 159).

After informing Penry that he had the right to remain silent, Cook explained that "it meant that he didn't have to tell me anything, that's in essence, then he acknowledged that he understood that." (1980 S.F. Vol. 4, p. 224). After informing Penry that any statement may be used against him, Cook explained to Penry that "if he gave a written statement, or his oral statement could possibly be used in court if he was tried for this offense that he was charged with, and he acknowledged that he understood that." (*Id.*). After informing Penry that he had a right to an attorney, Cook told him:

> that he had the right to have that lawyer present while we talked, and asked him further did he know what a lawyer was, and he said he did. And we had a discussion about an attorney, and

> he said he didn't need one. And then I went on to advise him, "if you're too poor to hire a lawyer, then the court will appoint a lawyer for you free of charge, and he can advise you before and during any questioning." And we talked about that, and I explained that a little bit more in detail. And I also told him, "you can decide to talk with anyone, and you can stop talking to them at any time you want." And I explained to him that if he decided to talk, that he could quit talking at any time, and he acknowledged that he understood that. I also told him that the above rights are continuing rights, which can be urged by him at any stage of the proceeding; in other words, I explained that to him in plain terms, it means that he can invoke – he can have his lawyer here any time he wants to.

(*Id.*, p. 225).

In the 1990 hearing, Cook testified that in addition to reading the warnings to Penry, Cook also "explained the rights to him. In other words, when I used the word attorney or lawyer, I even asked him if he knew what they were." (1990 S.F. Vol. 5, p. 153). Cook further testified:

> Of course, I gave him all the requirements in *Miranda* and I went through, I think there is basically, what five parts of the *Miranda*, and I would stop each time and go over and explain to him, do you know you can have your own attorney present, and he acknowledged that he could. I went on to explain about having him present, he could urge his rights at anytime, because urging is something that I felt needed further definition, I explained what urge meant, that he could have the lawyer here at anytime

> he wanted to, stop talking anytime he wanted to, and I got down fairly basic with the interpretation of what his rights were.

(*Id.*, p. 154). Penry told Cook, in response to specific questions, that he understood each of the rights. (*Id.*, pp. 154-55). Cook asked Penry to explain what a "lawyer" and "trial" were. Penry's answers satisfied Cook that Penry understood the terms. (*Id.*, p. 155). Cook then took a written statement from Penry. Cook repeated the *Miranda* warnings before he read a draft of Penry's statement back to him. (*Id.*, p. 163).

At his 1990 suppression hearing, Penry offered the testimony of Dr. Windall Dickerson, a psychologist. Dr. Dickerson testified that in his opinion, it was unlikely that Penry had understood the consequences of waiving his rights. (*Id.*, pp. 207, 216). Dr. Dickerson testified that the officers reading the *Miranda* warnings should have asked Penry what particular words in the warnings meant to verify that Penry understood his rights. (*Id.*, pp. 203-04). The trial court denied Penry's motion to suppress the two written confessions. (*Id.*, p. 308).

At trial, the court instructed the jury on the admissibility of Penry's confessions, as follows:

> You are instructed that under our law a confession of a defendant made while the defendant was in jail or other place of confinement or in the custody of an officer shall be admissible in evidence if it appears that the same was freely and voluntarily made, without compulsion or persuasion, provided, however, that it be made in writing and signed by the accused, and show

> that the accused has been warned prior to making such statement or confession. . . .

(Trans. Vol. 4, p. 1000). With respect to both written confessions, the court instructed:

> If . . . you find beyond a reasonable doubt that the aforementioned warning was given the defendant prior to his having made such statement, if he did make it, still, before you may consider such statement as evidence in this case, you must find from the evidence beyond a reasonable doubt that prior to and during such statement, if any, the defendant knowingly, intelligently and voluntarily waived the rights hereinabove set out in the said warning, and unless you so find, or if you have a reasonable doubt thereof, you will not consider the statement or confession for any purpose whatsoever or any evidence obtained as a result of the same.

(*Id.*, p. 1002).

This court analyzes Penry's claims against this record.

C. The Voluntariness and Waiver Claim

The Court of Criminal Appeals rejected Penry's claim that he had confessed involuntarily and without effectively waiving his Fifth Amendment right against self-incrimination. The court found that Penry voluntarily confessed because there was no evidence of coercion. *Penry*, 903 S.W.2d at 745-46 & n.27. The court found that Penry had voluntarily, knowingly, and intelligently waived his *Miranda* rights because the evidence showed that Penry had the "basic reasoning skills" necessary to

understand the rights, that he actually understood the rights, and that he had voluntarily waived those rights. *Id.* at 746.

"[C]oercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause of the Fourteenth Amendment." *Colorado v. Connelly*, 107 S. Ct. 515, 522 (1986); *see also Colorado v. Spring*, 107 S. Ct. 851, 857 (1987) (holding that a waiver of *Miranda* rights is involuntary only if accompanied by coercive conduct); *United States v. Male Juvenile*, 121 F.3d 34, 41 (2d Cir. 1997) ("The question [regarding the voluntariness of the defendant's waiver] is whether the government agents somehow misled defendant into believing that he could choose to speak without consequences, thus denying him any rational choice of whether to waive his rights and confess."); *Derrick v. Peterson*, 924 F.2d 813, 818 (9th Cir. 1990) ("[The defendant's] age and mental capacity are relevant to our due process inquiry only if we first conclude that the police's conduct was coercive.").

Penry offers no evidence that his confessions were induced or accompanied by police coercion. Although some of the officers who read Penry his *Miranda* rights were aware of Penry's low intelligence, there is no evidence that officers preyed upon Penry's low intelligence to coerce him into confessing or waiving his rights. The Court of Criminal Appeals' rejection of Penry's claim that his confessions were involuntary was not an unreasonable application of clearly established federal law, as determined by the Supreme Court.

In *Moran v. Burbine*, 106 S. Ct. 1135 (1986), the Supreme Court made it clear that a defendant's waiver of his *Miranda* rights must be both "voluntary" and "knowing and intelligent." The Court wrote:

> First the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both if the nature of the right being abandoned and the consequences of the decision to abandon it. Only of the "totality of the circumstances surrounding the interrogation" reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.

Id. at 1141 (citations omitted). A waiver is knowing and intelligent if the defendant "understood that he had the right to remain silent and that anything he said could be used as evidence against him." *Spring*, 107 S. Ct. at 857. "The Constitution does not require that a criminal suspect understand every possible consequence of a waiver of the Fifth Amendment privilege." *Id.* The Eleventh Circuit case Penry cites, *Smith v. Zant*, 887 F.2d 1407 (11th Cir. 1989), confirms this holding:

> A defendant need not understand all the complexities of his fifth amendment rights and of the implications of a decision to waive those rights. Rather, the defendant must understand only the core of the fifth amendment guarantee. . . . In determining whether a waiver of rights is valid, therefore, a court need only inquire into whether the defendant understood that he had a right "not to talk to law enforcement officers, to talk only with counsel present, or to discontinue talking at any time" and that "whatever he chooses to say may be used as evidence against him." The court does not concern itself with whether the defendant's decision to waive his rights was the "better" choice.

Id. at 1430 (Kravitch, J., concurring in part and dissenting in part).

Courts have consistently rejected the argument Penry asserts in this case. A waiver is not invalid merely because the defendant is of low intelligence or even retarded. *See, e.g., Rice v. Cooper*, 148 F.3d 747, 749-50 (7th Cir. 1998) (holding that an "illiterate and mildly retarded 16-year old" knowingly and voluntarily waived his *Miranda* rights); *Male Juvenile*, 121 F.3d at 38, 40-41 (holding that a 16-year old with "attentional difficulties" and "borderline to low average range of intellectual functioning with a Full Scale IQ of 71" knowingly and voluntarily waived his *Miranda* rights); *Taylor v. Rogers*, No. 95-3904, 1996 WL 515349, at *3 (6th Cir. Sept. 10, 1996) (unpublished table decision, 97 F.3d 1452) (holding that a "mildly to moderately retarded" defendant, who had "a mental age of eight to nine years old," knowingly and voluntarily waived his *Miranda* rights); *Mathenia v. Delo*, 975 F.2d 444, 448 (8th Cir. 1992) (holding that the defense counsel did not render ineffective assistance by failing to move for the suppression of defendant's confession based on the defendant's mild mental retardation and his IQ of 70); *Toste v. Lopes*, 861 F.2d 782, 783 (2d Cir. 1988) (holding that the defendant, who had a "personality disorder" and "low intelligence level," and who "operated at a sixth to

seventh grade level," knowingly and voluntarily waived his *Miranda* rights); *Dunkins v. Thigpen*, 854 F.2d 394, 399 (11th Cir. 1988) ("Mental retardation does not by itself prevent a defendant from voluntarily waiving his constitutional rights."); *United States v. Glover*, 596 F.2d 857, 866 (9th Cir. 1979) (finding that the defendant with low intelligence scores and "extensive dealings with the criminal process" had sufficient experience to familiarize himself with his *Miranda* rights and his option to waive those rights).

Penry has failed to present clear and convincing evidence to rebut the Court of Criminal Appeals' finding that Penry understood his rights and the consequences of waiving them. The evidence in the record clearly supports the appellate court's finding. Judge Galloway and each of the four law enforcement officers involved in reading Penry his *Miranda* rights, hearing his waiver of those rights, and hearing his confessions, all testified that Penry appeared to understand the *Miranda* warnings. This court need not rely on conclusory testimony that Penry understood the warnings: the record discloses that Ranger Cook specifically explained each of the rights to Penry, plainly and clearly. Penry's explanations of the meaning of the words "lawyer" and "trial" convinced Ranger Cook that Penry understood the warnings.

Penry's expert psychologist, Dr. Windall Dickerson, testified in the state court suppression hearing that he did not believe Penry understood the consequences of his waiver. Penry argues that the law enforcement officers did not rebut Dr. Dickerson's expert testimony. However, the trial court was entitled to give more weight to the officers' testimony than to Dr. Dickerson's testimony. The

trial court determined the factual disputes; that factual determination is entitled to a presumption of correctness under the AEDPA. The trial court's determination of mixed questions of law and fact was not an unreasonable application of clearly established federal law.

This court DENIES Penry's claim that the trial court erred in failing to suppress his confessions because the confessions were involuntary and because his waiver of his *Miranda* rights was not voluntary, knowing, and intelligent.

D. The Claims Relating to the Jury Instructions

Penry objected to the jury charge because "it fails to define the word 'intelligently', as regards the waiver of *Miranda* rights, so as to require an appreciation of the significance of the relinquishment of those rights in a mature and meaningful way." (Trans. Vol. 4, p. 991). The trial court denied Penry's objection and did not include in the charge a definition of "intelligently." The Court of Criminal Appeals denied Penry's objection, finding that the term "intelligently" did not need a specific definition in the charge because the term was used in its ordinary meaning. *Penry*, 903 S.W.2d at 747.

The Fifth Circuit has held that a Texas state court does not err in failing to define terms that have a "common" or "plain" meaning. *Nethery v. Collins*, 993 F.2d 1154, 1162 (5th Cir. 1993); *Milton v. Procunier*, 744 F.2d 1091, 1096 (5th Cir. 1984); *see also United States v. Brito*, 136 F.3d 397, 407 (5th Cir. 1998) ("[T]he trial judge need not define statutory terms unless they are highly 'technical or specific,' or 'outside the common understanding' of

jurors." (quoting *United States v. Chenault*, 844 F.2d 1124, 1131 (5th Cir. 1988))). Penry cites no authority for his argument that the word "intelligently" does not have a "common" or "plain" meaning or was "outside the common understanding" of the jurors.

In *Colorado v. Spring*, the Supreme Court held that a defendant knowingly and intelligently waives his *Miranda* rights when he understands "that he had the right to remain silent and that anything he said could be used as evidence against him." 107 S. Ct. at 857. Penry need not have "understood every possible consequence of a waiver." *Id.* This construction of "intelligently" does not require more than the plain or common meaning, within the common understanding of jurors. The Court of Criminal Appeals' denial of Penry's claim was neither contrary to, nor an unreasonable application of, clearly established Supreme Court authority.

Penry also objected to the jury charge on the ground that the trial court failed to include a definition of the word "warn." The Court of Criminal Appeals refused to address the merits of this claim because Penry did not object to the instructions on this ground at trial. *Penry*, 903 S.W.2d at 747. Penry has therefore procedurally defaulted this claim. *Muniz v. Johnson*, 132 F.3d 214, 221 (5th Cir. 1998).

Penry raised another objection to the jury charge, asserting that it incorrectly failed to instruct the jury that the officers must have "effectively communicate[d]" the *Miranda* warnings. (Trans. Vol. 4, p. 986). The Court of Criminal Appeals rejected Penry's claim because under Texas precedent, it is sufficient if the jury is instructed

that the waiver must have been voluntary, intelligent, and knowing. *Penry*, 903 S.W.2d at 748. Penry cites no Supreme Court or Fifth Circuit precedent to support his claim that additional instructions are required when the defendant has the intellectual impairments Penry possesses. The Court of Criminal Appeals' denial of Penry's claim was not contrary to clearly established federal law.

This court DENIES Penry's claims that the jury instructions regarding his confessions violated his Fifth Amendment rights.

XII. The Claim Based on the Denial of the Motion to Change Venue for the Retrial (Claim X)

Penry asserts that the trial court's denial of his motion to change the venue for his retrial from Walker County violated his Sixth and Fourteenth Amendment rights. He argues that he could not receive a fair trial in Walker County because "prejudicial pretrial publicity, the community's preexisting familiarity with [his] case – in particular his prior conviction and death sentence – and the special characteristics of the community . . . precluded selection of an impartial jury." (Docket Entry No. 18, p. 68). Penry does not take the position that his rights under the Sixth and Fourteenth Amendments were violated as a result of actual prejudice; instead, Penry argues that "the community in which he was tried was indeed 'so saturated' with prejudice as to make the selection of an impartial jury 'virtually impossible.' " Docket Entry No. 28, p. 68).

On direct appeal, the Texas Court of Criminal Appeals discussed the evidence presented at the change

of venue hearing. That court noted the absence of any evidence that TDCJ employees would necessarily be biased jurors. The Texas appellate court found that Penry "failed to show that publicity created a prejudice so great as to prevent a fair trial." *Penry*, 903 S.W.2d at 731. The court specifically found that Penry "was tried by jurors who had no opinion as to his guilt and . . . he received a fair trial." *Id.*

Whether pretrial publicity, or other aspects of a community from which a jury is drawn, preclude the availability of impartial jurors is a mixed question of law and fact. *Irvin v. Dowd*, 81 S. Ct. 1639, 1643 (1961); *see also Patton v. Yount*, 104 S. Ct. 2885, 2891 (1984). " '[E]ach case must turn on its special facts.' " *Calley v. Callaway*, 519 F.2d 184, 204 (5th Cir. 1975) (quoting *Marshall v. United States*, 79 S. Ct. 1171, 1173 (1959)). Consistent with the fact-specific nature of the impartiality inquiry, cases involving pretrial publicity are analyzed in light of the "totality of circumstances." *Murphy v. Florida*, 95 S. Ct. 2031, 2036 (1975); *Sheppard v. Maxwell*, 86 S. Ct. 1507, 1517 (1966); *Mata v. Johnson*, 99 F.3d 1261, 1271 (5th Cir. 1996), *vacated in part on other grounds*, 105 F.3d 209 (5th Cir. 1997). Ultimately, the question is whether, given the "totality of circumstances," the petitioner's trial was "fundamentally fair." *Murphy*, 95 S. Ct. at 2036.

A. Pretrial Publicity and Presumed Prejudice

Pretrial publicity alone may warrant a presumption of prejudice, that is, a presumption that an impartial jury could not be drawn from the community exposed to the publicity. *Rideau v. Louisiana*, 83 S. Ct. 1417, 1419-20

(1963); *see also Murphy*, 95 S. Ct. at 2035. When a presumption of prejudice exists, a review of the voir dire transcript is unnecessary. *Rideau*, 83 S. Ct. at 1419-20. If pretrial publicity does not in itself require a presumption of prejudice, the court examines the voir dire transcript to ascertain whether the potential prejudicial publicity compromised the jury's ability to be impartial. *See Patton*, 104 S. Ct. at 2889-90; *Murphy*, 95 S. Ct. at 2036-37; *Irvin*, 81 S. Ct. at 1645. The voir dire may reveal actual, "identifiable" prejudice on the part of a juror, *Estes v. Texas*, 85 S. Ct. 1628, 1633 (1965), or it may "permit[ ] an inference of actual prejudice" on the part of the jury as a whole. *Murphy*, 95 S. Ct. at 2038.

In *United States v. Chagra*, the Fifth Circuit interpreted this case law to set out three circumstances in which a habeas petitioner "can obtain reversal of his conviction because of pretrial publicity":

> First, [the habeas petitioner] can demonstrate an actual, identifiable prejudice attributable to the publicity in question on the part of a member of the jury which decided his case. An appellant must prove that such prejudice existed "not as a matter of speculation but as a demonstrable reality." Proof of such prejudice is normally made by reliance upon the juror's voir dire responses. Second, an appellant can demonstrate that prejudicial, inflammatory publicity about his case so saturated the community from which his jury was drawn as to render it virtually impossible to obtain an impartial jury. Proof of such poisonous publicity raises a presumption that appellant's jury was prejudiced, relieving him of the obligation to establish actual prejudice by a juror in his case. This

> presumption is rebuttable, however, and the government may demonstrate from the voir dire that an impartial jury was actually impanelled in appellant's case. If the government succeeds in doing so, the conviction will stand despite appellant's showing of adverse pretrial publicity. Finally, an appellant can establish both that pretrial publicity about his case raised "a significant possibility of prejudice," and that the voir dire procedure followed by the district court in his case failed to provide a " 'reasonable assurance that prejudice would be discovered if present.' "

669 F.2d 241, 249-50 (5th Cir. 1982) (citations omitted), *overruled on other grounds by Garrett v. United States*, 105 S. Ct. 2407 (1985). Penry argues that his retrial falls within the second circumstance described in *Chagra*.

Citing *Rideau*, the Fifth Circuit has stated that the "presumed prejudice" standard "is only 'rarely' applicable." *United States v. OKeefe*, 722 F.2d 1175, 1180 (5th Cir. 1983); *Mayola v. Alabama*, 623 F.2d 992, 997 (5th Cir. 1980) (quoting *Nebraska Press Ass'n v. Stuart*, 96 S. Ct. 2791, 2800 (1976)). In *Rideau*, the Court reversed the conviction of a habeas petitioner whose interrogation by, and admissions to, the sheriff were filmed and broadcast three times by the local television station to a large segment of the community from which his jury was drawn. *Rideau*, 83 S. Ct. at 1418. The Court noted that it need not "paus[e] to examine a particularized transcript of the voir dire examination of the members of the jury," for "[a]ny subsequent court proceedings in a community so pervasively

exposed to such a spectacle could be but a hollow formality." *Rideau*, 83 S. Ct. at 1419-20. The Fifth Circuit interprets *Rideau* as requiring two showings: (1) "an 'extreme situation' of inflammatory pretrial publicity that literally saturated the community in which his trial was held"; and (2) "that the populace from which his jury was drawn was widely infected by a prejudice apart from mere familiarity with the case." *Chagra*, 669 F.2d at 251 (quoting *Mayola*, 623 F. 2d at 997, 999).

With respect to the first showing, the Fifth Circuit looks for publicity that "approximates in the level of its prejudicial nature the dramatic spectacle of Rideau's televised confession." *Mayola*, 623 F.2d at 997. With respect to the second showing, the petitioner must present "circulation figures or other evidence of the degree of community exposure to the prejudicial content of the offensive news coverage." *Id.* at 998.

In determining the level of prejudicial pretrial publicity, the Supreme Court has looked to the quantity, time, nature, and content of the publicity. While a large quantity of "adverse" publicity increases the probability of prejudice, *see Irvin*, 81 S. Ct. at 1644, a large amount of publicity is not in itself sufficient to create a presumption of prejudice. In *Dobbert v. Florida*, the Court found the petitioner's argument "that the extensive coverage by the media denied him a fair trial" inadequate because it "rest[ed] almost entirely on the quantum of publicity which the events received." 97 S. Ct. 2290, 2303 (1977).

The publicity must have occurred near the time of the trial. In *Patton*, the Court observed that most of the

adverse publicity at issue had centered around the petitioner's first trial. Jury selection for the second trial, the one challenged as unfair, took place four years later. *Patton*, 104 S. Ct. at 2889. The Court distinguished Patton's case from the facts involved in *Irvin*, in which "during the six or seven months immediately preceding trial . . . 'a barrage of newspaper headlines, articles, cartoons and pictures was unleashed against [the defendant].' " *Id.* (quoting *Irvin*, 81 S. Ct. at 1644) (second alteration in original). The *Patton* Court stated that although "[i]t would be fruitless to attempt to identify any particular lapse of time that in itself would distinguish the situation that existed in *Irvin*[,] . . . it is clear that the passage of time between a first and a second trial can be a highly relevant fact." *Id.* at 2891.

The Court also considers the nature of the publicity, including whether most of the publicity consists of negative editorial or straightforward factual reporting. *See Patton*, 104 S. Ct. at 2887; *Sheppard*, 86 S. Ct. at 1510-12. In *Beck v. Washington*, 82 S. Ct. 955, 963 (1962), the Court distinguished between "straight news stories" and "invidious articles which would tend to arouse ill will and vindictiveness."

Reports of confessions,[18] reports of prior convictions,[19] and prejudicial statements by

[18] *Rideau*, 83 S. Ct. at 1419 (the community was exposed to "the spectacle of Rideau personally confessing in detail to the crimes with which he was later to be charged"); *Irvin*, 81 S. Ct. at 1644 (reports that petitioner confessed to 24 burglaries).

[19] *Irvin*, 81 S. Ct. at 1644 ("reference[s] to crimes committed when a juvenile [and] his convictions for arson").

officials[20] are particularly suspect forms of pretrial publicity. However, the Supreme Court has held that reports of prior convictions do not give rise to a presumption of prejudice, rejecting the argument "that persons who have learned . . . of a defendant's prior criminal record are presumed to be prejudiced." *Murphy*, 95 S. Ct. at 2035. Also relevant to the Court's analysis of the content of any publicity is whether the information disseminated was part of the evidence presented at the trial. *Sheppard*, 86 S. Ct. at 1511 (a detective disclosed the results of tests that called the defendant's account of the facts into question; evidence of the tests was not submitted at trial); *Stroble v. California*, 72 S. Ct. 599, 604-05 (1952) (holding that the potential for prejudice resulting from publishing "extensive excerpts" from a defendant's confession was diminished by the fact that the "confession was read into the record at the preliminary hearing").

At Penry's second trial, the trial judge conducted an evidentiary hearing on the motion to change venue after the general jury voir dire ended. The trial court took judicial notice of that voir dire and of the voir dire held in Penry's competency trial. At the hearing on the motion to change venue, Penry presented the following evidence of pretrial publicity:

- The parties stipulated that the population of Walker County was approximately 55,206, of whom 8,670 were inmates. The number of

[20] *Irvin*, 81 S. Ct. at 1644 (the publicity reported the "determination . . . of the prosecutor to secure the death penalty" and the "promise of a sheriff to devote his life to securing petitioner's execution").

employees of the Texas Department of Criminal Justice employed in Walker County was 5,168, not all of whom lived in Walker County. The parties stipulated to the daily and Sunday circulations in Walker County of the *Houston Chronicle*, the *Houston Post*, and the *Huntsville Item*. The parties also stipulated to the audience shares of the television stations in Walker County; the number of homes in Walker County with television sets; the total number of households in Walker County; the total number of registered voters in Walker County; and the total number of employed residents of Walker County.

- Raymond Teske, Jr., an associate professor of criminal justice at Sam Houston State University in Huntsville, Texas, testified as to a telephone survey he conducted of one hundred Walker County residents. The survey revealed that 39% of the residents recognized Penry by name; an additional 25% of the residents did not recognize the case by name, but recognized one or more facts from the case; and 36% of the residents did not recognize the name or the facts of the case. Of the persons surveyed, 26% thought Penry was "definitely guilty" of the crime; an additional 30% thought he was "probably guilty"; and 44% were uncertain as to Penry's guilt. A total of 43% of those surveyed both recognized the case and thought Penry was definitely or probably guilty. Of the persons surveyed, 40% thought Penry should receive the death sentence. A total of 30% of those surveyed recognized the case, thought Penry was definitely or probably guilty, and should receive the death sentence. Professor Teske conducted the same survey in Galveston County and obtained lower figures in each of the above categories.

Professor Teske also testified that he did not believe an impartial jury could be impaneled because Walker County was "small and homogenous" and because many residents had ties to the Texas Department of Criminal Justice ("TDCJ"). Penry was imprisoned at the TDCJ unit in Huntsville.

- William Habern, a Hunstville, Texas defense attorney, testified that based on his conversations with Walker County residents, he believed that the "general consensus" of Walker County was that Penry "is guilty, that, the re-trial is a waste of time, and the fact that a more expedient thing to do is to go ahead and administer the death penalty." (S. F. Vol. 14, p. 1138).

- Kay Douglas, an attorney for the TDCJ in Huntsville, Texas, testified that based on her conversations with Walker County residents, she believed that the majority of Walker County residents believed that Penry was guilty. Douglas also testified that the large number of TDCJ employees living in Walker County made it likely that county residents were familiar with Penry and his case.

- Jane Swanson, an attorney for East Texas Legal Services in Huntsville, Texas, testified that based on her conversations with Walker County residents, she believed that it was the "general community's sentiments" that Penry was guilty and should not have received a retrial. (*Id.*, p. 1161). Swanson also testified that residents of Polk County, where

the murder was committed, often visited Walker County.

- Approximately seventy articles were published in the *Houston Post*, the *Houston Chronicle*, and the *Huntsville Item* about Penry's case. The articles spanned approximately the four years before the change of venue hearing.
- Videotapes and transcripts of at least six television newscasts about Penry's case were broadcast in Houston, Lufkin, and Bryan, Texas between 1988 and 1990. (*Id.*, pp. 1092-93).
- Edward Bronson, a professor of political science at California State University at Chico, testified that based on the distribution levels of the three newspapers, the number of articles in the two years preceding the change of venue hearing, and the "inflammatory" nature of many of the articles, it was "unlikely" that a fair and impartial jury for Penry's retrial could be selected in Walker County.

The prosecution presented the following evidence at the hearing:

- Oscar Thorn, the Walker County Tax Assessor and Collector, testified that based on his conversations with Walker County residents, he believed that Penry could receive a fair trial.
- Dale Myers, the Walker County Sheriff, testified that he believed, based on his conversations with Walker County residents, that Penry could receive a fair trial. Sheriff Myers

testified that there was little interaction between Polk and Walker counties.

- Randy Ellisor, general manager of the Huntsville cable television station, testified that he believed, based on his conversations with Walker County residents, that Penry could receive a fair trial.
- Ellisor testified that Polk County and Walker County did not enjoy a "special relationship or connection." (*Id.*, p. 1275).
- Rusty Davis, a Walker County insurance salesman, testified that he believed, based on his conversations with Walker County residents, that Penry could receive a fair trial.
- Travis McDonald, an assistant prosecutor for the TDCJ prison prosecution unit, who prosecuted crimes committed by incarcerated prisoners, testified that he prosecuted a murder case and an attempted murder case in Walker County in which the jury returned a not guilty verdict against an inmate. McDonald testified that TDCJ employees were on both jury panels. McDonald testified that in his experience, TDCJ employees impaneled as jurors in murder cases in Walker County "for the most part . . . tended to follow the law" and were unbiased against inmates. (*Id.*, p. 1291).
- Frank Robinson, a Walker County judge, testified that he believed, based on his conversations with Walker County residents, that Penry could receive a fair trial.

There was clearly extensive pretrial publicity regarding Penry's case in Walker County. In the nearly eleven

months before the venue hearing and after the Supreme Court reversed his conviction, approximately forty-two print articles mentioned Penry's case. In his survey, Professor Teske concluded that sixty-four percent of Walker County residents recognized the case. Fifty-two of the ninety venirepersons at the general jury voir dire recognized the case. During the individual voir dire examination, sixty-three of eighty-eight venirepersons recognized the case.

The nature of the reporting about Penry was mixed. A substantial majority of the reports were straightforward factual reporting. However, several inflammatory editorials and letters to the editor were also published. This material described Penry's crime in inflammatory language, highlighted Penry's future dangerousness, and downplayed or criticized Penry's mitigating evidence.

The articles described information that was, for the most part, included in the evidence presented at Penry's retrial. The articles referred to Penry's previous conviction. Some of the articles described Penry as a "killer," "murderer," or "death row inmate"; referred to Penry's confession; and referred to Penry's prior death sentence. At least one article noted that Penry had confessed to the killing in interviews given while on death row.

Against this conflicting evidence presented at the hearing, this court analyzes whether the state court could properly conclude that the quantity, quality, timing, nature, and content of the pretrial publicity did not create "a prejudice so great as to prevent a fair trial."

B. Voir Dire Rebuttal of Presumed Prejudice

In *Murphy v. Florida*, the Supreme Court confined the "presumed prejudice" standard first promulgated in *Rideau* to extreme circumstances. The Court stated:

> [*Rideau*, *Sheppard*, and *Estes*] cannot be made to stand for the proposition that juror exposure to information about a state defendant's prior convictions or to news accounts of the crime with which he is charged alone presumptively deprives the defendant of due process. To resolve this case, we must turn, therefore, to any indications in the totality of circumstances that petitioner's trial was not fundamentally fair.

Murphy, 95 S. Ct. at 2036. The Fifth Circuit has interpreted *Murphy* and *Rideau* to permit the State to rebut a presumption of prejudicial publicity by reference to the voir dire proceedings. In *Mayola*, the court stated:

> "[U]nder the *Rideau* rule the trial court is not precluded from utilizing the *voir dire* to help gauge the intensity of community prejudice inspired by pre-trial publicity." Thus, even where the petitioner adduces evidence of widely disseminated, adverse publicity, the actual interrogation of members of the community on *voir dire* may belie the appearance of any pervasive community prejudice for example by demonstrating a general lack of credence in or familiarity with the prejudicial aspects of the publicity.

Mayola, 623 F.2d at 1000 (citation omitted). The *Mayola* court also held that the prosecution may rebut a showing of prejudice by proving that the "twelve jurors finally impanelled actually were impartial." *Id.* at 1000-01; *see*

also *OKeefe*, 722 F.2d at 1180; *Chagra*, 669 F.2d at 250. The *Mayola* court stated:

> Where, despite the existence of such hostile publicity, the state demonstrates that an impartial jury was actually impanelled, the fair trial guarantees of the Sixth and Fourteenth Amendments that the *Rideau* rule was articulated to protect will have been satisfied. Consequently, we believe the state should be accorded this opportunity to rebut the presumption of jury prejudice.

Mayola, 623 F.2d at 1001.

In concluding that its review of the voir dire did not "permit[ ] an inference of actual prejudice," *Murphy*, 95 S. Ct. at 2038, the *Murphy* Court observed that the voir dire "indicate[d] no such hostility to petitioner by the jurors who served in his trial as to suggest a partiality that could not be laid aside." *Id.* at 2036; *see also Chagra*, 669 F.2d at 252-53; *Calley v. Callaway*, 519 F.2d 184, 206 (5th Cir. 1975). The Court also noted that another relevant factor was "the length to which the trial court must go in order to select jurors who appear to be impartial." *Murphy*, 95 S. Ct. at 2037; *see also Chagra*, 669 F.2d at 253 (concluding that the district court's voir dire procedure was "capable of giving 'reasonable assurance that prejudice would be discovered if present' " (quoting *United States v. Hawkins*, 658 F.2d 279, 283 (5th Cir. 1981))).

In *Irvin*, the Court cautioned:

> It is not required . . . that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case

> can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin, 81 S. Ct. at 1642-43. The trial court judge's finding that a juror is capable of setting aside any "impression or opinion" is accorded great deference, particularly when a federal court is reviewing the findings of a state trial court. *See Mu'Min v. Virginia*, 111 S. Ct. 1899, 1903 (1991).[21] Such findings "should be set aside only where prejudice is 'manifest.' " *Irvin*, 81 S. Ct. at 1643 (quoting *Reynolds v. United States*, 98 U.S. 145, 156 (1878)). The Court explained the reason behind this deference to the trial court's findings of impartiality in *Rosales-Lopez v. United States*:

> The trial judge's function [in voir dire] is not unlike that of the jurors later on in the trial. Both must reach conclusions as to impartiality and

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[21] The *Mu'Min* Court stated that "[w]e enjoy more latitude in setting standards for voir dire in federal courts under our supervisory power than we have in interpreting the provisions of the Fourteenth Amendment with respect to voir dire state courts." 111 S. Ct. at 1904.

> credibility by relying on their own evaluations of demeanor evidence and of responses to questions.

101 S. Ct. 1629, 1634 (1981).

After a review of the voir dire examination of both the venire and of the the jurors actually impaneled, this court finds that the respondent has successfully rebutted any presumption of prejudicial pretrial publicity. Fifty-two of the approximately ninety venirepersons had some knowledge of Penry's case. (S.F. Vol. 15, p. 128). The trial court struck seventeen of the ninety venirepersons for cause because they held the opinion that Penry was guilty.[22] *See Murphy*, 95 S. Ct. at 2037-38 (finding no constitutional violation due to prejudicial pretrial publicity when twenty of seventy-eight venirepersons were excused because they believed the defendant to be guilty). In Penry's competency trial, two of fifty-three potential jurors were struck because they could not be impartial based on their knowledge of the case. In contrast, ninety percent of the venire in *Irvin* stated that they could not be impartial. *Irvin*, 81 S. Ct. at 1645. The fact that seventeen of ninety people were so prejudiced against Penry as to require striking them from the panel for cause "by no means suggests a community with sentiment so poisoned against [Penry] as to impeach the

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[22] At general voir dire, the trial court excused three venirepersons because they were familiar with Penry's case and could not be impartial. (S.F. Vol. 15, pp. 73, 79, 93). Fourteen more venirepersons were struck for the same reason during individual voir dire.

indifference of jurors who displayed no animus of their own." *Murphy*, 95 S. Ct. at 2038.

The voir dire examination also makes it clear that the trial court employed procedures that gave "reasonable assurance that prejudice would be discovered if present." *Hawkins*, 658 F.2d at 283 (quoting *United States v. Delval*, 600 F.2d 1098, 1102 (5th Cir. 1979)). The juror questionnaires required each venire person to disclose any familiarity with the facts of the case and any memory of television or newspaper coverage of the case. The trial court allowed counsel to voir dire the venire as a whole. During the general voir dire, the court asked how many of the venire had heard of or read about the case. The court told the venireperson that anything they may have heard about the case was not evidence and asked whether any venireperson would be unable to ignore the publicity he had heard. The court permitted the prosecutor to ask again how many of the venirepersons had heard of the case. *See Chagra*, 669 F.2d at 253 n.15 ("The use of . . . collective questions to identify the individuals possibly having knowledge about the case followed by a separate examination of each such individual is entirely acceptable."); *Capo*, 595 F.2d at 1091 (approving use of the same procedure).

The individual voir dire examinations, conducted outside the presence of other venirepersons, were thorough and extensive. The individual voir dire examinations of the approximately ninety venirepersons was conducted on twenty-one separate days. *See Yount*, 104 S. Ct. at 2890 n.10 (describing the voir dire as "particularly extensive" when ten days were used to question 167 venirepersons); *Capo*, 595 F.2d at 1092 (noting that the

"arduous" voir dire took ten days for seventy-three venirepersons). Many of these days were devoted exclusively to voir dire. The individual voir dire examinations filled close to 6,000 pages of transcript. *See United States v. Harrelson*, 754 F.2d 1153, 1160 (5th Cir. 1985) (noting that the voir dire lasted seven days and filled over 2,000 pages of transcript).

The judge, prosecutor, and defense counsel questioned each venireperson repeatedly and at length about the extent of his or her knowledge of the case, the effect of that knowledge, and his or her ability to be fair and impartial. *See Calley*, 519 F.2d at 209 (noting that "importantly, both defense counsel and the prosecution were allowed almost unlimited freedom to inquire into the [military] court members' attitudes, perceptions, backgrounds and the nature and extent of their exposure to pretrial publicity"); *see also Harrelson*, 754 F.2d at 1160. This method tracked the procedures the Fifth Circuit recommended in *Chagra* for cases in which pretrial publicity is extensive:

> [A] district court should determine which, if any, panel members may have had some knowledge of or attitudes about the case from pretrial publicity and should examine each such panel member outside the presence of the remaining panel members and the venire with an eye towards discovering the depth and breadth of that knowledge or attitude rather than as a means of educating him about his responsibilities as a juror. The district court should then make an independent determination whether the panel member can and will be impartial.

Chagra, 669 F.2d at 253 n.14 (citing *United States v. Davis*, 583 F.2d 190, 196-97 (5th Cir. 1978)); *see also Capo*, 595 F.2d at 1091-92; *Calley*, 519 F.3d at 208-09.

Finally, none of the twelve jurors actually impaneled possessed a significant amount of knowledge about the inflammatory facts of the case. None of the twelve jurors had any doubt about his or her ability to be impartial.

- Jurors William Franz and Thomas Roberts had never heard of Penry and knew nothing about the case. Juror Lloyd Davis had read "a little bit" about the case in the newspaper but had "forgotten what that even said." (S.F. Vol. 18, p. 959). Davis had no opinion about the case and stated that he could be impartial.

- Juror Gary Dean McClure had read "a little bit" about the case in one newspaper article and had heard a few facts about the case in conversations. (S.F. Vol. 20, pp. 1283, 1328-29). McClure stated that he "really [didn't] know that much about [the case]" and that he "really kn[e]w nothing about it." (*Id.*, p. 1283). McClure had no opinion about the case and stated that he could be impartial.

- Juror David Moreno had heard "some conversations" about the case and had read one newspaper article "some time ago" about the case. (S.F. Vol. 22, p. 1760). The only fact he could remember about the case was that Penry was on death row and "this case was on appeal due to some question on the mental retardation or something to that effect. That is about all I can remember." (*Id.*; *see*

also id., p. 1797). Moreno had no opinion about the case and stated that he could be impartial.

- Juror Forest Marler had only heard Penry's name "on the news or something." (S.F. Vol. 23, p. 1999). He knew none of the facts of the case and "couldn't remember any details on anything." (*Id.*). Marler had no opinion about the case and stated that he could be impartial.

- Juror Mary Yarbrough had heard on television only that "there was a killing in Livingston." (*Id.*, p. 2140). Yarbrough stated that she knew nothing "about the history of the case." (*Id.*, p. 2146). Yarbrough "heard that it happened, and that is all I know about it." (*Id.*, p. 2187). Yarbrough had no opinion about the case and stated that she could be impartial.

- Juror Diane Wood had read about the case in an article in the *Houston Chronicle*. Wood knew that the Supreme Court had reversed Penry's sentence and that Penry would be retried. (S.F. Vol. 24, p. 2368). Wood admitted that she at first felt "angry" when she read that Penry's sentence had been overturned. (S.F. Vol. 32, p. 4492). However, Wood stated that she had felt anger toward the "law," not Penry, with respect to the reversal. (*Id.*, p. 4493). Wood also stated that her anger had been because "maybe it wasn't done right the first time in trial" and that the error would be the fault of "the court." (*Id.*, pp. 4493-94). Wood also stated that she would not "feel any different" about the case knowing that Penry had been tried before. (S.F. Vol. 24, p.

2368). Wood stated that she would give Penry a presumption of innocence and could be impartial.

- Juror Machere Gillaspie had heard after the general voir dire only that Penry was incarcerated. Gillaspie did not know when Penry had been incarcerated or what crime he had committed. Gillaspie had no opinion about the case and stated that she could be impartial.

- Juror Earl Fountain had read an article in the *Huntsville Item* regarding the scheduled start of Penry's retrial. Fountain stated that "the only thing I have heard about it, is what little I read in the paper about them not letting – they didn't want the press printing anything about it, or what you all said up there at the courthouse. I don't remember reading anything about it in the paper." (S.F. Vol. 28, p. 3375). Fountain's wife had also told him that Penry "was this guy from Livingston or something that killed a woman or something, that's about all that we really talked about." (*Id.*). Fountain had no opinion about the case and stated that he could be impartial.

- Juror Douglas Massey's father had served on the jury in Penry's competency trial. Massey's father told him only "very general things" about the facts of the case. (S.F. Vol. 34, p. 366-A). Massey had also read an article in the *Houston Chronicle* about the case and was familiar with the basic procedural history of the case and the circumstances of the crime. Massey stated that the fact that Penry

had been previously convicted and sentenced to death would not affect his deliberations. Massey stated that he had no opinion about the case and that he could be impartial.

- Juror Mark McElligott stated that he "may have seen the headlines in the paper," but did not read any articles about the case and knew none of the facts of the case. (S.F. Vol. 35, p. 753-A). McElligott stated that he had no opinion about the case and could be impartial.

Penry challenged only two of the jurors for cause. (Trans. Vol. 3, pp. 636, 659). Both challenges were unsuccessful; neither challenge was related to these jurors' knowledge of Penry's case. *See Chagra*, 669 F.2d at 252-53 (noting that none of the impaneled jurors was challenged for cause). Although a few of the jurors arguably were familiar with some of the facts of the case, none of the jurors gave any hint that knowledge of these facts would predispose him or her against Penry. *See Murphy*, 95 S. Ct. at 2036 n.4 ("We must distinguish between mere familiarity with petitioner or his past and an actual predisposition against him. . . . "); *Calley*, 519 F.2d at 207 (noting that none of the jurors "stated that he had formed an opinion as to the guilt or innocence of Calley"). None of the jurors expressed any doubt that he or she could be impartial. *See Chagra*, 669 F.2d at 252 (noting that the one juror who had any familiarity with the case stated that she was not biased); *Calley*, 519 F.2d at 207 ("All court members stated that their decision would not be influenced by any of the publicity with which they had been in contact."). The trial court is entitled to "great deference" in determining that

a venireperson accurately states that he or she can be impartial.

Only one juror, Douglas Massey, was familiar with any of the "inflammatory" facts of the case. Massey clearly and repeatedly stated that this knowledge would not affect his deliberations and that he could be impartial. *See Mayola*, 623 F.2d at 1001 ("[A] showing that none of the twelve jurors impanelled had ever been exposed, first or second hand, to the inflammatory publicity, would probably suffice to negate the presumption of prejudice flowing from that publicity."). As in *Murphy*, the individual voir dire of the actual jurors does not "indicate . . . such hostility to [Penry] . . . as to suggest a partiality that could not be laid aside." 95 S. Ct. at 2036.

The Court of Criminal Appeals' determination that Penry was not unconstitutionally prejudiced by pretrial publicity is not an unreasonable application of clearly established Supreme Court authority. This court DENIES Penry's claim that the trial court's denial of his motion to change venue violated his constitutional rights.

XIII. The Prosecution's Definition of "Mitigating" During the Voir Dire (Claim XI)

During voir dire, the prosecution described "mitigating circumstances" as circumstances that reduce a defendant's "blame" for the crime. Penry objected to this description of mitigating circumstances as a misstatement of law. (S.F. Vol. 23, p. 1925; S.F. Vol. 25, p. 2478; Trans. Vol. 3, p. 570). On direct appeal, the Texas Court of Criminal Appeals rejected Penry's claim, noting that "defense counsel had the opportunity to cross-examine

each veniremember regarding the meaning of mitigating [and] the trial court instructed each juror prior to his individual voir dire that anything the attorneys said could not be considered as evidence, and also defined the term 'mitigating' in the court's charge." *Penry*, 903 S.W.2d at 741. The issue is whether the appellate court's determination that any error in the prosecutor's statement was harmless is an unreasonable application of clearly established federal law.

In *Lockett v. Ohio*, the Supreme Court defined mitigating evidence as "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 98 S. Ct. at 2965. This court, assumes, without deciding, that the prosecutor's description of mitigating circumstances was inconsistent with *Lockett*. Defense counsel had an opportunity to cross-examine each of the prospective jurors as to the meaning of "mitigating" and to give the proper definition. In addition, the judge, as well as the prosecutor and defense counsel, repeatedly told the prospective jurors that the attorneys' statements during voir dire were not instructions on the law. The trial court charge to the jury defined "mitigating," giving a definition consistent with *Lockett*.

The charge stated, in pertinent part:

> A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue.

(Trans. Vol. 5, p. 1329). The Supreme Court made it clear that "arguments of counsel generally carry less weight with a jury than do instructions from the court. . . . Arguments of counsel which misstate the law are subject to objection and to correction by the court." *Boyde v. California*, 110 S. Ct. 1190, 1200 (1990) (citations omitted).

This court concludes that any error resulting from the prosecution's statement was harmless. Under *Brecht v. Abrahamson*, 113 S. Ct. 1710, 1722 (1993), the prosecution's description of mitigating circumstances did not have a "substantial and injurious effect" on the jury's verdict. The Court of Criminal Appeals' ruling was not an unreasonable application of federal law. Penry's claim that his constitutional rights were violated by the prosecution's description of mitigating circumstances to prospective jurors is DENIED.

XIV. The Sentencing Charge (Claim XII)

A. The Failure to Define "Personal Culpability"

Penry argues that the trial court erred by instructing the jury that the mitigating evidence had to be relevant to his "personal culpability," without defining the term.

The relevant portions of the sentencing charge stated:

> If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give

> effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

(Trans. Vol. 5, p. 1329). Penry argues that the trial court's use of the term "personal culpability," without a definition, did not make it clear that Penry's mitigating evidence may have properly lessened his "overall moral culpability" without necessarily reducing his blame for the crime itself. Penry states:

> Absent an instruction that clearly defined "personal culpability" so as to fully include, not restrict, the scope of Penry's mitigating circumstances, the jury was reasonably likely to conclude that "personal culpability" required that mitigating circumstances directly reduce Penry's blame for the crime itself.

(Docket Entry No. 18, p. 88). Penry argues that the prosecutor's closing argument compounded the error in the charge. The argument emphasized that Penry had not shown a connection between his crime and his mental retardation and background of childhood abuse. The Texas Court of Criminal Appeals rejected Penry's claim based on state court precedent approving virtually identical instructions. *Penry*, 903 S.W.2d at 765.

The standard for determining whether jury instructions adequately permit the jury to consider and give

effect to mitigating evidence is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Buchanan v. Angelone*, 118 S. Ct. 757, 761 (1998) (quoting *Boyde*, 110 S. Ct. at 1198). Penry argues that the jury was reasonably likely to interpret the term "personal culpability" to prevent consideration of evidence that would not "directly reduce Penry's blame for the crime itself." This court assumes for the purpose of this petition that the jury was reasonably likely to interpret "personal culpability" to prevent consideration of this evidence. The issue is whether this evidence is "constitutionally relevant" mitigating evidence.

In *Penry* I, the Supreme Court approved the use of the term "personal culpability" with reference to mitigating evidence. The Court noted that a jury must be able to consider and give effect to mitigating evidence "because the punishment should be directly related to the *personal culpability* of the defendant." *Penry* I, 109 S. Ct. at 2951 (emphasis added). Penry is correct that in *Lockett*, the Supreme Court defined mitigating evidence as "any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." *Lockett*, 98 S. Ct. at 2964. In post-*Lockett* cases, however, the Court clarified that "constitutionally relevant" character evidence is evidence causally linked to the defendant's crime.

In *Penry* I, the Supreme Court noted that mitigating evidence must be considered in a sentencer's "individualized assessment of the appropriateness of the death penalty" because

> of the belief, long held by this society, that defendants who commit criminal acts *that are attributable to* a disadvantaged background, or to emotional or mental problems, may be less culpable than defendants who have no such excuse.

Penry I, 109 S. Ct. at 2947 (emphasis added) (quoting *California v. Brown*, 107 S. Ct. 837, 841 (1987) (O'Connor, J., concurring)).

The Fifth Circuit has interpreted *Penry* I to require that "constitutionally relevant" mitigating evidence shows that the defendant's "criminal act was attributable to [his] severe permanent condition." *Davis v. Scott*, 51 F.3d 457, 460-61 (5th Cir. 1995) (citations omitted). "[F]or evidence to have mitigating relevance to the special issues, there must be a *nexus* between the mitigating evidence and the criminal act." *Id.* at 461 (emphasis added); *see also Turner v. Johnson*, 106 F.3d 1178, 1189 (5th Cir. 1997); *Harris v. Johnson*, 81 F.3d 535, 539 & n.11 (5th Cir. 1996); *Allridge v. Scott*, 41 F.3d 213, 223 (5th Cir. 1994); *Madden v. Collins*, 18 F.3d 304, 308 (5th Cir. 1994); *Russell v. Collins*, 998 F.2d 1287, 1292 (5th Cir. 1993).

Penry cites *Skipper v. South Carolina*, 106 S. Ct. 1669 (1986), in support of his argument. In *Skipper*, the Supreme Court held that a sentencing jury may not be precluded from considering a defendant's evidence that he had exhibited good behavior during his pretrial detention. The Court noted: "Although it is true that any [favorable] inferences [from the defendant's evidence] would not relate specifically to petitioner's culpability for the crime he committed, there is no question but that such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than

death.' " *Id.* at 1671 (citation omitted) (quoting *Lockett*, 98 S. Ct. at 2965). Penry cites this statement as support for his argument that constitutionally relevant mitigating evidence need not be causally linked to a defendant's culpability for his crime.

In *Skipper*, however, the mitigating evidence tended to show that the defendant would not pose a danger in the future. The Court noted that "the jury could have drawn favorable inferences from this testimony regarding petitioner's character and his probable future conduct if sentenced to life in prison." *Id.* The Court continued:

> Consideration of a defendant's past conduct as indicative of his probable future behavior is an inevitable and not undesirable element of criminal sentencing: "any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose."

Id. (quoting *Jurek v. Texas*, 96 S. Ct. 2950, 2958 (1976) (plurality opinion)).

In *Franklin v. Lynaugh*, 108 S. Ct. 2320 (1988), the Court discussed *Skipper* in the context of the Texas special issues. The petitioner in *Franklin* argued that the Texas special issue on "future dangerousness" did not permit the jury to consider and give effect to evidence of his good disciplinary record during his incarceration. Citing *Skipper*, the petitioner argued that the "future dangerousness" special issue did not allow the jury "to give 'independent' mitigating weight to his prison record . . . as a reflection on his 'character.' " *Id.* at 2329. The Court rejected this argument. The Court held that the petitioner's mitigating evidence was relevant only as it

related to his potential for future dangerousness. The Court limited its holding in *Skipper* to situations in which the defendant's proffered mitigating character evidence shows a lack of future dangerousness:

> [O]ur discussion in *Skipper* of the relevancy of such disciplinary record evidence in capital sentencing decisions dealt exclusively with the question of how such evidence reflects on a defendant's likely future behavior. Nothing in *Skipper* suggests that such evidence has any further relevancy with respect to a defendant's "character" or with respect to the punishment decision.

Id. at 2329-30 (citation omitted). *Skipper* does not stand for the proposition that evidence unrelated to the defendant's future dangerousness or his crime is constitutionally relevant mitigating evidence.

This court recognizes the tension between cases such as *Skipper* and *Franklin*, which acknowledge that relevant mitigating evidence includes evidence that the defendant will not be a danger in the future, and the post-*Penry* I line of cases, which require relevant mitigating evidence to have a nexus to the crime itself. Evidence regarding the defendant's present lack of future dangerousness may or may not have a "nexus" to the defendant's crime. A defendant could not, for example, argue that his crime was "attributable to" his lack of future dangerousness.

This tension appears to result from the fact that the Supreme Court allows states to channel the sentencer's discretion through consideration of whether "aggravating factors" are present, such as a defendant's future dangerousness. *Jurek*, 96 S. Ct. at 2956-57. A defendant is entitled

to respond to evidence of his future dangerousness with evidence of his lack of future dangerousness. In such cases, "constitutionally relevant" mitigating evidence does include evidence of the lack of future dangerousness. The Fifth Circuit has implicitly accounted for this necessity in stating that constitutionally relevant mitigating evidence does not include "evidence unrelated to a defendant's culpability *or capacity for rehabilitation.*" *Barnard v. Collins*, 958 F.2d 634, 640 (5th Cir. 1992) (emphasis added) (citing *Skipper*, 106 S. Ct. at 1671). However, no Supreme Court or Fifth Circuit precedent supports Penry's argument that evidence of his mental retardation and childhood abuse, that was not shown to have a nexus to his crime or to relate to his future dangerousness, is "constitutionally relevant" mitigating evidence.

Penry has not shown that the jury was reasonably likely to have interpreted the term "personal culpability" to prevent consideration of constitutionally relevant mitigating evidence.[23]

The Court of Criminal Appeals' denial of Penry's claim was neither contrary to, nor an unreasonable application of, *Skipper* or other clearly established Supreme Court authority.

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[23] Penry offers no other explanation as to how the trial court's use of the term "personal culpability," without a definition, may have unconstitutionally restricted the jury's consideration of his mitigating evidence.

B. Inclusion of a "No Sympathy" Instruction

The sentencing charge stated in part:

> You are further instructed that you are not to be swayed by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling in considering all the evidence before you and in answering the special issues.

(Trans. Vol. 5, p. 1329). Penry argues that because of this instruction, it was reasonably likely that the jurors did not consider mitigating evidence that may have evoked compassion for Penry without excusing his crime. The Court of Criminal Appeals denied this claim based on Texas precedent. *Penry*, 903 S.W.2d at 766.

The Supreme Court has squarely held that a trial court may instruct the jury not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" in making its sentencing decision, even if the defendant's mitigating evidence evokes sympathy. *California v. Brown*, 107 S. Ct. 837, 839-40 (1987); *see also Johnson v. Texas*, 113 S. Ct. 2658, 2671 (1993) ("[W]e have not construed the *Lockett* line of cases to mean that a jury must be able to dispense mercy on the basis of a sympathetic response to the defendant."); *Saffle v. Parks*, 110 S. Ct. 1257, 1259, 1263-64 (1990) (approving an instruction telling the jurors that they "must avoid any influence of sympathy, sentiment, passion, prejudice, or other arbitrary factor when imposing sentence"). The Court has also ruled that a holding that a "no sympathy" instruction is unconstitutional would create a new rule

under *Teague v. Lane*, 109 S. Ct. 1060, 1067-68 (1989) (plurality opinion).[24] *See Saffle*, 110 S. Ct. at 1261.

Penry attempts to distinguish his argument from those the Court rejected in *Brown* and *Saffle*. Penry asserts that the combination of the trial court's "no sympathy" instruction with the trial court's "confusing" instruction on how to give effect to the mitigating evidence made it reasonably likely that the jurors failed to consider the constitutionally relevant mitigating evidence Penry introduced. However, Penry does not explain how the court's mitigating evidence instruction, which told the jurors how to *give effect* to Penry's mitigating evidence, was likely to suggest to the jury that they could not *consider* Penry's relevant evidence. Penry has not shown that the combination of these two instructions made it reasonably likely that the jury failed to consider his constitutionally relevant mitigating evidence. The Court of Criminal Appeals' rejection of this claim was neither contrary to, nor an unreasonable application of, clearly established federal law.

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[24] In *Teague*, the Court held that a federal habeas Court must determine whether the relief sought by the petitioner would create a "new rule." If so, the Court may not announce or apply the new rule unless: (1) the "rule places a class of private conduct beyond the power of the State to proscribe, or addresses a 'substantive categorical guarante[e] accorded by the Constitution,' " *Saffle*, 110 S. Ct. at 1263 (alternation in original) (citing *Teague*, 109 S. Ct. at 1075 (quoting *Penry*, 109 S. Ct. at 2953); or (2) the rule is a " 'watershed rule[ ] of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.* at 1264 (citing *Teague*, 190 S. Ct. at 1076). Neither exception applies in this case.

C. The Burden of Proof Instruction

Penry argues that the sentencing charge failed to instruct the jurors that the State had the burden to prove, beyond a reasonable doubt, that Penry's mitigating evidence did not warrant a sentence less than death. The trial court gave the jurors the following burden of proof instructions:

> The burden of proof in this phase of the trial still rests upon the State and never shifts to the defendant. Each Special Issue submitted must be proved by the State beyond a reasonable doubt; therefore, before any issue may be answered "Yes," all jurors must be convinced by the evidence beyond a reasonable doubt that the answer to such issue should be "Yes."

(Trans. Vol. 5, p. 1326). The sentencing charge did not specifically instruct the jury that the State had the burden to prove that Penry's mitigating evidence did not warrant a life sentence.

Penry did not present this argument to the Texas state courts. A petitioner fails to exhaust state remedies when he does not give the state courts a "fair opportunity" to apply controlling legal principles to his habeas claims. *Anderson v. Harless*, 103 S. Ct. 276, 277 (1982). In his brief on direct appeal to the Texas Court of Criminal Appeals, Penry relied solely on provisions of the Texas Code of Criminal Procedure to support his claim, and made no reference to federal constitutional violations. (Brief for Appellant at 267, *Penry v. State*, 903 S.W.2d 715 (Tex. Crim. App. 1995) (No. 71, 130)). Penry's claim is therefore procedurally barred. *Nobles*, 127 F.3d at 423.

Penry does not argue that an exception to the procedural bar applies.

Penry's claim fails on the merits as well. "[A] defendant's constitutional rights are not violated by placing on him the burden of proving mitigating circumstances sufficiently substantial to call for leniency." *Walton v. Arizona*, 110 S. Ct. 3047, 3055 (1990). This court DENIES Penry's challenges to the jury instructions in the sentencing charge.

XV. The Challenge to the Competency Trial (Claim XIII)

(A) The Failure to Define Terms in the Jury Charge

In the competency trial, the judge gave the jury a charge that defined "incompetent to stand trial" as follows:

> A person is incompetent to stand trial for an offense if he does not have:
>
> (a) sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding; or
>
> (b) a rational as well as factual understanding of the proceeding against him.

(Trans. Vol. 1, p. 196). The charge did not define the terms "reasonable," "rational," or "understanding." Penry timely objected to the charge and tendered an instruction. Penry's requested instruction defined the phrase "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" as: "the

defendant has enough knowledge and intelligence to understand and respond to the words used by the court, the state's attorneys, his own attorneys, and the witnesses that he is able to participate in the trial in a meaningful way." (*Id.*, pp. 182, 192-93). Penry argues that the failure to define these terms made the charge unconstitutionally vague.

The Texas Court of Criminal Appeals cited the proper Supreme Court standard and denied this claim. *Penry*, 903 S.W.2d at 729-30. The Texas appellate court noted that the Supreme Court has not required that a court specifically explain these terms to a jury; the terms at issue are not "so technical that they are legal terms of art." *Id.* at 730.[25]

The trial court's definition of "incompetent to stand trial" tracked the Supreme Court's standard in *Dusky v. United States*, 80 S. Ct. 788, 789 (1960): "whether [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him." Penry argues that the trial court should have defined the phrase beginning "sufficient present ability" because Penry was on trial for capital murder and his competency was a very close issue.

Penry was not entitled to definitions of "reasonable," "rational," or "understanding," solely because his was a

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[25] Respondent's argument that this claim is barred as part of a "second or successive" petition fails because the current petition attacks only the 1990 conviction.

capital case. The Supreme Court and the Fifth Circuit have repeatedly approved the *Dusky* instruction, without additional definitions, in capital cases. *See, e.g., Godinez v. Moran*, 113 S. Ct. 2680, 2685 (1993); *Moody v. Johnson*, 139 F.3d 477, 481 (5th Cir. 1998); *Carter v. Johnson*, 131 F.3d 452, 459 (5th Cir. 1997).

This court rejects Penry's argument that a different instruction was necessary because his was a close case in which the jurors were predisposed to disfavor his "mental defense." (Docket Entry No. 18, p. 95). Penry cites no federal cases holding that additional clarification of the terms in the *Dusky* instruction is required, even in a capital case, because the evidence of incompetence is disputed or conflicting. Other than the evidence Penry cites in support of his change of venue claim, Penry offers no evidence that the jurors in his competency trial were predisposed against his attempt to show that he was incompetent to stand trial. As discussed more fully below, the trial court's failure to change the venue for his competency trial did not unconstitutionally prejudice Penry.

The state court's denial of Penry's claim that the trial court erred by failing to instruct the competency trial jurors as to the meaning of "reasonable," "rational," and "understanding," was not contrary to the Supreme Court's decision in *Dusky* or other clearly established federal law.

B. The Failure to Clarify the Effect of a Finding of Incompetence

Penry argues that the trial court erred in failing to advise the jury that a finding of incompetence would not preclude a trial and conviction should Penry become competent to stand trial in the future. Penry argues that such an instruction was necessary to counteract the prosecution's argument that Penry was "dangerous" and the implication that Penry would return to society if he were found incompetent.

The Court of Criminal Appeals found this argument to be procedurally defaulted because Penry failed to object at trial on constitutional grounds to the court's refusal to submit his requested instruction. *Penry*, 903 S.W.2d at 729. The Court of Criminal Appeals has held that "[a]n objection stating one legal theory may not be used to support a different legal theory on appeal." *Johnson v. State*, 803 S.W.2d 272, 292 (Tex. Crim. App. 1990), *overruled on other grounds by Heitman v. State*, 815 S.W.2d 681 (Tex. Crim. App. 1991); *see also Thomas v. State*, 723 S.W.2d 696, 700 (Tex. Crim. App. 1986) ("[I]f an objection made in the trial court differs from the complaint made on appeal, a defendant has not preserved any error for review."). Texas's contemporaneous objection rule is an independent and adequate state procedural bar. *Muniz v. Johnson*, 132 F.3d 214, 221 (5th Cir. 1998). Penry has procedurally defaulted this claim. He does not argue that he meets any of the exceptions to the procedural default bar.

This court also notes that Penry has failed to cite, and this court has not discovered, any case law supporting

Penry's position that his requested competency instruction was constitutionally required. Habeas relief based on this claim is not available from this court.

C. Failure to Change the Venue of the Competency Trial

Penry argues that the trial court erred in denying his motion to change the venue of the competency trial. Penry argues that pretrial publicity about his case made the venire at his competency trial presumptively biased. The Court of Criminal Appeals discussed the evidence presented at the venue hearing in the competency trial and denied Penry's claim. That court found insufficient evidence that Penry could not obtain a fair competency trial because of pretrial publicity. *Penry*, 903 S.W.2d at 726-27.

At the hearing on his motion for change of venue, Penry presented approximately thirty-one newspaper articles, editorials, or letters to the editor about his case from the *Houston Chronicle*, *Houston Post*, *Dallas Times Herald*, and the *Huntsville Item*. Most of the articles appeared in 1989 and 1990. Penry also presented the testimony of Hal Ridley, a criminal defense lawyer practicing in Walker County, who stated that he believed Penry could not receive a fair competency trial. Ridley based his testimony on Penry's publicized status as a death row inmate and the number of TDCJ employees who would likely be in the jury pool. Ridley testified that TDCJ employees tend to believe that "any kind of a mental claim is, you know, put on," and that TDCJ employees are careful not to let themselves get "conned"

by inmates. (S.F. Vol. 9, p. 410). Ridley also testified that the newspaper articles prejudiced Penry because they attributed quotes to Penry which a reader would identify with competency to stand trial. The trial court also took judicial notice of the competency trial voir dire.

Respondent argues that the trial court did not violate Penry's constitutional rights by denying the motion to change venue because Penry had no constitutional right to a competency trial at all, noting that the Supreme Court reversed only Penry's sentence. Respondent also argues that Penry's competency was determined before his 1980 trial and that Penry's "mental retardation is not the type of competency issue that is subject to change over time." (Docket Entry No. 20, p. 68).

This court assumes, for the purpose of this petition, that Penry had a constitutional right to a competency trial free from prejudicial pretrial publicity and that the *Irvin* line of pretrial publicity cases applies. Penry has made no showing that the pretrial publicity surrounding his case created "an 'extreme situation' of inflammatory pretrial publicity that literally saturated the community in which his trial was held." *Chagra*, 669 F.2d at 251. Penry made no showing that the articles he cites had any effect on the ability of jurors from Walker County to judge his competency fairly. Penry offered only speculation that the articles would convey information relevant to the public's perception of his competency. Penry also presented no evidence, other than Hal Ridley's testimony, of the "degree of community exposure to the prejudicial content of the offensive news coverage." *Mayola v. Alabama*, 623 F.2d 992, 998 (5th Cir. 1980).

Even if Penry had made a showing sufficient to establish a presumption of partiality, respondent has successfully rebutted the presumption through the voir dire examination at the competency trial. The venire consisted of approximately fifty-three persons. The trial court asked the venire as a whole if anyone had heard of the case. Although the record is unclear, it appears that between twenty and twenty-five venirepersons answered "yes." The court asked those venirepersons if anything they had heard about the case "would cause you a problem, have your mind made up one way or the other." (S.F. Vol. 7, p. 62). Two venirepersons answered this question in the affirmative. The court excused both of these venirepersons for cause.

The trial court then conducted a thorough individual voir dire examination of each of the venirepersons who indicated some knowledge about the case. Outside the presence of the venire, the trial court and counsel questioned each of these venirepersons about the extent of his or her knowledge of the case and his or her opinion regarding mental retardation. The court asked all of these venirepersons if they could be fair and impartial. This procedure gave "reasonable assurance that prejudice would be discovered if present." *Chagra*, 669 F.2d at 253 nn.14-15; *see also Capo*, 595 F.2d at 1091-92; *Calley*, 519 F.2d at 208-09.

Moreover, none of the twelve jurors actually impaneled had knowledge of Penry's case beyond the fact that Penry was mentally retarded and had previously been sentenced to death. Each of the jurors affirmed that he or she could be fair and impartial. *See Murphy*, 95 S. Ct. at 2036 n.4; *Chagra*, 669 F.2d at 252; *Calley*, 519 F.2d at 207.

This court DENIES Penry's claim that the trial court's denial of his motion to change the venue of the competency trial violated his constitutional rights.

XVI. The Trial Court's Admission of Evidence Containing Hearsay (Claim XIV)

During the sentencing phase of Penry's trial, the trial court admitted into evidence several of Penry's medical records, over Penry's objection. Portions of the records contained references to Penry's attempts to commit arson when he was a teenager and his alleged homosexual behavior.[26] Penry argues that the trial court erred in admitting these records into evidence because the records contained hearsay and deprived him of his Sixth Amendment right to confront adverse witnesses. Penry also argues that some of the records contained statements he made during a psychiatric examination, violating *Estelle v. Smith*.

The Texas Court of Criminal Appeals rejected Penry's Sixth Amendment argument. The court held that Penry's Sixth Amendment rights were not violated because the out-of-court statements were corroborated by other evidence and because the statements bore sufficient indicia of reliability to be admissible. *Penry*, 903 S.W.2d at 761-62.

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[26] The records include State's exhibits 91-A, 95-C, 96-A, 96-B, 97-A, 99, 99-A, 99-B, 101-A, 102, and 102-A. (S.F. Vol. 49, pp. 1407-37).

Respondent does not deny that the records contain hearsay.[27] "[T]he [Confrontation] Clause does not necessarily prohibit the admission of hearsay statements against a criminal defendant, even though the admission of such statements might be thought to violate the literal terms of the Clause." *Idaho v. Wright*, 110 S. Ct. 3139, 3145 (1990). "The wrongful admission of hearsay evidence violates the Confrontation Clause only when the evidence was a 'crucial, critical or highly significant factor in the framework of the whole trial.' " *Gochicoa v. Johnson*, 118 F.3d 440, 446 (5th Cir. 1997) (quoting *Cupit v. Whitley*, 28 F.3d 532, 537 (5th Cir. 1994)). This court must consider five factors in determining whether hearsay evidence was "crucial, critical or highly significant":

(1) whether the hearsay evidence was "crucial" or "devastating";

(2) whether prosecutors misused a confession or otherwise engaged in misconduct;

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[27] Respondent appears to argue that Penry waived his rights under the Confrontation Clause because he offered portions of the records during the competency and punishment phases of the trial. The parties stipulated before the guilt/innocence phase of the trial that the medical records introduced at Penry's competency trial did not require authentication by a business records custodian. (S.F. Vol. 41, pp. 51-52). However, Penry reserved objections to the documents based on relevance and hearsay. (*Id.*, pp. 50, 53). Penry did not waive his rights under the Confrontation Clause to object to hearsay statements.

Respondent also argues that Penry's claim is barred by the doctrine of judicial estoppel and that the prosecution was entitled to introduce the records under Tex. R. Evid. 106. Because this court upholds the Court of Criminal Appeals' decision on the merits, it does not reach these arguments.

(3) whether a joint trial or the wholesale denial of cross-examination was involved;

(4) whether the most important prosecution witness, as well as other prosecution witnesses, was available for cross-examination; and

(5) the degree to which the hearsay evidence is supported by "indicia of [its] reliability."

Id. (citing *Cupit*, 28 F.3d at 532).

"[T]he most important of the five factors are the first and the fifth." *Id.*; *see also United States v. Cheramie*, 51 F.3d 538, 541 (5th Cir. 1995) ("Hearsay evidence is inadmissible under the confrontation clause unless it can be shown that the declarant is unavailable to testify and that the hearsay evidence is supported by adequate indicia of reliability."). With respect to the first factor, "[t]he determination of whether the evidence is 'crucial' or 'devastating,' . . . recognizes that the erroneous admission of unreliable hearsay may nonetheless be harmless in light of other evidence at trial." *Gochicoa*, 118 F.3d at 447. This factor "simply restates the harmless error rule." *Id.* at 447 n.5 (citing *United States v. Sarmiento-Perez*, 633 F.2d 1092, 1103 n.6 (5th Cir. 1981)). With respect to the fifth factor, "[a] statement of an unavailable witness is sufficiently reliable only if it falls within a firmly rooted exception to the hearsay rule or if it carries particularized guarantees of trustworthiness." *Id.* at 446-47.

The Court of Criminal Appeals found that the hearsay statements contained in Penry's medical records were corroborated by other evidence at trial. The statements regarding Penry's attempts at arson were corroborated by

testimony from Patsy Ross and Dr. Quijano. (*Id.*, pp. 1228-29, 1237-38; S.F. Vol. 50, pp. 1636-37). The objectionable hearsay statements in Penry's medical records were not "crucial" or "devastating" under the *Gochicoa* standard.

The Court of Criminal Appeals found that the hearsay statements were reliable because they

> were made many years ago by [Penry's] family, doctors, and nurses in the context of [Penry's] medical treatment, and not in the context of this criminal proceeding. . . . [T]he declarants had no obvious motive for bias against [Penry] and in many cases described the events while they were fresh on their minds.

Penry v. State, 903 S.W.2d at 762. The state court concluded that these factors gave the hearsay statements "particularized guarantees of trustworthiness."[28]

The state court's denial of Penry's Confrontation Clause claim was not an unreasonable application of clearly established federal law. Penry did not present his *Estelle v. Smith* claim to the Texas courts. It is now barred as an abuse of the writ. *See Nobles v. Johnson*, 127 F.3d 409, 420 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1845 (1998).

This court DENIES Penry's claim that the admission of medical records containing hearsay violated his Fifth and Sixth Amendment rights.

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[28] The three other factors listed in *Gochicoa* also support the state court's conclusion.

XVII. The Constitutionality of the Texas Clemency Procedures (Claim XV)

In Texas, the governor may, in his discretion, grant clemency in the form of a temporary reprieve, commutation of punishment, or a pardon, on the nonbinding recommendation of the Texas Board of Pardons and Paroles (the "Board"). TEX. CONST. art. IV, § 11(b); *see also* TEX. CODE CRIM. PROC. art. 48.01.[29] The Board makes clemency recommendations in capital cases based on a majority vote. 37 TEX. ADMIN. CODE § 141.3. The Board is not required to meet in person to vote on a clemency application. Board members are not required to vote on each application. The Texas Administrative Code, which sets out provisions establishing the Board and its procedures, does not set objective criteria for the Board to apply in determining whether to recommend commutation of a death sentence. *Id.* § 143.57. The Board's chairman stated in December 1997 that the Board had not established internal guidelines to guide the members' discretion in capital clemency cases. The chairman reportedly stated: "Each board member decides individually on what basis to recommend or deny action." Stefanie Asin & Kathy Walt, *Execution of Tucker Scheduled for Feb. 3*, HOUS. CHRON., Dec. 19, 1997, at A1.

Penry argues that the governor of Texas has articulated an "extra-statutory" clemency policy in which he

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[29] The governor may grant one thirty-day reprieve of execution without the Board's recommendation. 37 TEX. ADMIN. CODE § 143.41(a). The governor may not grant a commutation or pardon without the Board's recommendation. *See id.* §§ 143.1, 143.51.

will grant clemency only if there is doubt as to the defendant's guilt or if the defendant has been deprived of fair access to the courts on "all outstanding legal issues." (Docket Entry No. 18, p. 113) (citing Asin & Walt, *Execution of Tucker Scheduled for Feb. 3*, at A1); *see also Bush Explains Decision to Commute Lucas' Sentence*, HOUS. CHRON., July 14, 1998, at 13A (noting that the governor stated in a speech that "his bottom line [with respect to clemency decisions] is the defendant's guilt or innocence"). Penry argues that the governor's policy deprives Penry of his substantive and procedural due process rights and that the procedures governing the Board's decisionmaking in capital commutation cases are so arbitrary as to deprive Penry of procedural due process.

Respondent does not challenge Penry's factual description of the governor's clemency policy or of the Board's procedures in capital clemency cases. Respondent argues that this court may not reach the merits of Penry's claims because: (1) the claims are not yet ripe for consideration, and (2) Penry's claims are procedurally barred because he failed to present them to the state courts.

A. Ripeness

Respondent argues that Penry's claim is not ripe because he has not yet sought, or been denied, clemency. Penry asserts that he would seek clemency on the basis of his asserted ineligibility for the death penalty. This basis for clemency is unrelated to the issue of Penry's innocence of the crime itself. Assuming, on the basis of this record, that Penry's characterization of the governor's policy is correct, the governor would not consider this

argument for clemency. Respondent argues that Penry's claim is not ripe because Penry may receive clemency when he seeks it and because the Board's procedures may change before he does.

" '[T]he ripeness inquiry focuses on whether an injury that has not yet occurred is sufficiently likely to happen to justify judicial intervention.' " *American Forest and Paper Ass'n v. United States EPA*, 137 F.3d 291, 296 (5th Cir. 1998) (quoting *Chevron U.S.A., Inc. v. Traillour Oil Co.*, 987 F.2d 1138, 1153-54 (5th Cir. 1993)). "For an issue to be ripe for adjudication, a plaintiff must show that he 'will sustain immediate injury' and 'that such injury would be redressed by the relief requested.' " *Cinel v. Connick*, 15 F.3d 1338, 1341 (5th Cir. 1994) (quoting *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 98 S. Ct. 2620, 2635 (1978)); *see also Whitmore v. Arkansas*, 110 S. Ct. 1717, 1724-25 (1990) (holding that "[a] threatened injury must be 'certainly impending' " to confer Article III standing to bring a claim (citation omitted)).

The ripeness issue is whether Penry's threatened injury is "immediate" or "certainly impending," making it sufficient to justify judicial intervention at this time. Although a defendant need not have exhausted his appeals in order to apply for a commutation of his death sentence, the Board may not render a decision on the merits of an application without an "execution date." 37 TEX. ADMIN. CODE § 143.57(2). This language implies that the Board will not decide a commutation application if the defendant's execution has been stayed. *See State ex rel. Holmes v. Honorable Court of Appeals for Third Dist.*, 885 S.W.2d 389, 391 (Tex. Crim. App. 1994) (noting that the

Board did not act on a defendant's application for clemency because the Court of Criminal Appeals had stayed the defendant's execution); *see also* 37 TEX. ADMIN. CODE § 143.43(f)(3) (requiring the Board to abstain from deciding an application for a reprieve in a capital case if the defendant's execution has been stayed). Because Penry's execution date has been set and his execution stayed, Penry likely will not be able to obtain a decision from the Board until his habeas proceedings are concluded and his stay of execution is lifted. In that case, Penry could present ripe claims to this court only by filing a successive petition raising the claims. Given the strict limitations on this court's ability to reach the merits of a claim presented in a successive petition, this court is unwilling to find Penry's claims unripe on this ground.

In addition, although the governor's policy could change before Penry submits his clemency application, Penry cannot wait for the outcome of the clemency decision before seeking relief. Penry will have no adequate remedy if he is denied clemency because his execution would likely occur immediately after the denial.

With respect to the Board's procedures, respondent has presented no evidence that the Board's procedures are likely to change before a decision is rendered on Penry's application. Penry cannot afford to wait until he is actually deprived of his protected interest to challenge the Board's procedures. This court finds that Penry's claims are ripe.

B. Exhaustion

Penry did not present the claims to the state courts on direct appeal or in his state habeas application. Penry's claims are therefore unexhausted under TEX. CODE CRIM. PROC. § 11.071. *See Nobles*, 127 F.3d at 423. Penry argues that he could not have presented the claims to the state courts because the State of Texas had not yet set his execution; Penry argues that he therefore had no "immediate need" to seek clemency relief. This court assumes Penry asserts that he meets the exception in article 11.071 § 5(a)(1), for claims in which the "factual or legal basis for the claim was unavailable" on the date the initial application was filed.

The Board procedures require only that a defendant file his application for clemency after his "conviction"; there is no requirement that a defendant be under an execution date before filing. Penry presents no evidence that the Board procedures were different when he filed his state habeas application. The factual and legal bases for Penry's challenge to the Board's procedures were not unavailable on the date he filed his application. Penry has procedurally defaulted this claim.

However, Penry's evidence of the governor's policy is from December 19, 1997, after the date Penry filed his initial state application. Penry's claim regarding the governor's policy meets the exception in section 5(a)(1). This court will nonetheless address both of Penry's claims on the merits.

C. The Merits

Penry argues that the governor's policy deprives him of his substantive due process rights. The Due Process Clause "provides heightened protection against governmental interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 117 S. Ct. 2258, 2267 (1997). The Supreme Court has recently made it clear that capital defendants do not have a liberty interest in executive clemency. In *Ohio Adult Parole Authority v. Woodard*, 118 S. Ct. 1244 (1998), the Court rejected the defendant's argument that Ohio's clemency procedure violated his due process rights. In an opinion written by Chief Justice Rehnquist, a four-member plurality of the Court stated:

> The process [the defendant] seeks would be inconsistent with the heart of executive clemency, which is to grant clemency as a matter of grace, thus allowing the executive to consider a wide range of factors not comprehended by earlier judicial proceedings and sentencing determinations. . . . We agree that [the defendant] maintains a residual life interest, e.g., in not being summarily executed by prison guards. However, . . . [the defendant] cannot use his interest in not being executed in accord with his sentence to challenge the clemency determination by requiring the procedural protections he seeks.

Id. at 1250. The Chief Justice's opinion later stated: "There is thus no substantive expectation of clemency." *Id.* at 1251. In his opinion concurring and dissenting in the holding, Justice Stevens explicitly agreed that a state is

not constitutionally required to provide a clemency procedure, *id.* at 1255 (Stevens, J., concurring in part and dissenting in part), and in a four-member concurring opinion, Justice O'Connor implicitly agreed with this proposition. *Id.* at 1254 (O'Connor, J., concurring). This court rejects Penry's claim that the governor's clemency policy deprives him of his substantive due process rights.

In *Woodard*, five members of the Court agreed that a state that chose to implement a clemency procedure was required to provide some procedural safeguards. Justice O' Connor stated: "I believe that the Court of Appeals correctly concluded that some *minimal* procedural safeguards apply to clemency proceedings." *Id.* (O'Connor, J., concurring) (emphasis in original). Justice Stevens stated: "[I]f a State adopts a clemency procedure as an integral part of its system for finally determining whether to deprive a person of life, that procedure must comport with the Due Process Clause." *Id.* at 1255 (Stevens, J., concurring in part and dissenting in part).

Woodard, however, does not support Penry's argument that the governor's determination to limit clemency consideration to claims of factual innocence or lack of fair access to the courts fails to provide minimal procedural guarantees. Justice O'Connor stated that "[j]udicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Id.* at 1254 (O'Connor, J., concurring). Similarly, Justice Stevens stated that "no one would contend that a governor could ignore the commands of the Equal

Protection Clause and use race, religion, or political affiliation as a standard for granting or denying clemency." *Id.* at 1255 (Stevens, J., concurring in part and dissenting in part). Justices Stevens and O'Connor make clear that "*minimal* procedural guarantees" require only that clemency decisions not be arbitrary.

The governor's decision to limit clemency to claims of factual innocence and unfair process is not so arbitrary or unfair as to violate the "minimal" guarantees required. In *Herrera v. Collins*, 113 S. Ct. 853, 868 (1993), the Supreme Court specifically noted that clemency has historically provided a "fail safe" precaution against the execution of innocent persons. The Court stated: "History shows that the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency." *Id.* at 869. While nothing in *Herrera* limits clemency to addressing claims of factual innocence, *Herrera* makes it clear that it is reasonable, rather than arbitrary, for a state to use its clemency procedure as a device to prevent the execution of the innocent. This court DENIES Penry's claim that the governor's policy violates his procedural due process rights.

Penry's claim that the Board's procedures deny him procedural due process is also unpersuasive. The Board is not required to employ objective criteria to make its clemency recommendations in capital cases. *Woodard* requires that clemency decisions not be a product of arbitrary factors. Penry presents no evidence that the Board members exercise their discretion in a discriminatory or arbitrary manner. To the contrary, the record

shows that the Board considers claims of factual innocence. The Board recently voted 17-1 to recommend a reprieve for a death row defendant because of doubts about his guilt. *See* Kathy Walt *et al., Parole Board Recommends Lucas be Spared*, HOUS. CHRON., June 26, 1998, at A1. Penry asserts that no Board member voted to commute a death sentence in 1997 and that, in some cases, not all Board members voted. Even if these assertions are true, they do not evidence such arbitrariness in the Board members' decisionmaking as to warrant habeas relief.

This court DENIES Penry's claim that the State of Texas's clemency procedures deny him procedural due process.

XVIII. Certificate of Appealability

Penry has not requested a Certificate of Appealability ("COA"), but this court may determine whether he is entitled to one. *See Hughes v. Johnson*, 991 F. Supp. 621, 639 (S. D. Tex. 1998). A petitioner may obtain a COA either from the district court or an appellate court, but an appellate court will not consider a petitioner's request for a COA until the district court has denied such a request. *Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1998); *see also Hill v. Johnson*, 114 F.3d 78, 82 (5th Cir. 1997) ("[T]he district court should continue to review COA requests before the court of appeals does."). "A plain reading of the AEDPA compels the conclusion that COAs are granted on an issue-by-issue basis, thereby limiting appellate review to those issues alone." *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997).

A COA may issue only if the petitioner has made a "substantial showing of the denial of a constitutional right."[30]

28 U.S.C. § 2253(c)(2); *see also United States v. Kimler*, 150 F.3d 429, 431 (5th Cir. 1998). "A petitioner can meet this burden by demonstrating that 'the issues [presented] are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further.' " *Little v. Johnson*, 162 F.3d 855, 859 (5th Cir. 1998) (alteration in original) (quoting *Barefoot v. Estelle*, 103 S. Ct. 3383, 3394-95 & n.4 (1983)). "The nature of the penalty in a capital case is a 'proper consideration in determining whether to issue a [COA], but the severity of the penalty does not in itself suffice to warrant the automatic issuing of a certificate.' " *Id.* (quoting *Barefoot*, 103 S. Ct. at 3394-95).

This court has carefully and exhaustively considered each of Penry's claims. While the issues Penry raises are clearly important and deserving of the closest scrutiny, this court finds that each of his claims is foreclosed by clear, binding precedent, often recently decided. This

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[30] In Section 102 of the AEDPA, Congress amended 28 U.S.C. § 2253 to provide that a COA, rather than a certificate of probable cause ("CPC"), is the appropriate mechanism for allowing a habeas petitioner to appeal a final judgment from a federal district court. "The standard for obtaining a COA is the same as for a CPC." *Muniz v. Johnson*, 114 F.3d 43, 45 (5th Cir. 1997); *Murphy v. Johnson*, 110 F.3d 10, 11 (5th Cir. 1997). However, "a COA, unlike a CPC, must 'indicate which specific issue or issues satisfy the showing required. . . . ' " *Murphy*, 110 F.3d at 11 n.l (quoting 28 U.S.C. § 2253(c)(3)).

court concludes that under these precedents, Penry has failed to make a "substantial showing of the denial of a constitutional right." This court concludes that Penry is not entitled to a certificate of appealability.

XIX. Conclusion

Penry has presented a substantial majority of his claims to the Texas state courts in post-conviction proceedings. To the extent certain claims were not previously presented to the Texas courts, they are unexhausted and are denied as an abuse of the writ. *See Nobles*, 127 F.3d at 420.

As to those claims which were presented to the Texas Court of Criminal Appeals, either on direct appeal or during the state habeas proceedings, Penry can obtain federal habeas relief only upon a showing that the state court's adjudication was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Penry has failed to satisfy this burden.

This court GRANTS respondent's motion for summary judgment; DENIES Penry's motion to strike respondent's motion for summary judgment; and DENIES Penry's cross-motion for summary judgment. This court lifts the stay of execution, denies Penry's petition for a writ of habeas corpus (Docket Entry No. 18), and denies Penry a certificate of appealability. An appropriate final order dismissing this case will issue separately.

SIGNED on March 29, 1999 at Houston, Texas.

/s/ Lee H. Rosenthal
Lee H. Rosenthal
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

JOHNNY PAUL PENRY,	§	
	§	
Petitioner,	§	CIVIL ACTION
	§	NO. H-97-4094
VS.	§	
	§	
GARY L. JOHNSON,	§	
Director, Texas Department of	§	
Criminal Justice, Institutional	§	
Division,	§	
	§	
Respondent.	§	

MEMORANDUM AND OPINION

In a March 29, 1999 Memorandum and Order, this court analyzed the petition for writ of habeas corpus filed by petitioner, Johnny Paul Penry, and granted summary judgment in favor of respondent, Gary L. Johnson, Director of the Texas Department of Criminal Justice – Institutional Division, on each of Penry's claims. (Docket Entry No. 33). Following a detailed review of Penry's arguments, this court determined that Penry was not entitled to a Certificate of Appealability ("COA").

Penry has filed a motion to alter and amend the judgment and a brief in support. (Docket Entry Nos. 36, 37). Based on the motion, the brief, this court's March 29, 1999 Memorandum and Order, and the applicable law, this court DENIES Penry's motion to alter and amend the judgment. The reasons are stated below.

I. The Motion to Alter and Amend the Judgment

Penry raises two grounds: (1) this court applied an impermissibly restrictive standard in denying Penry a COA; and (2) this court erred in its legal analysis of Penry's "mitigation instruction" claim.

A. The Legal Standard for Granting a COA

The law is clear that a COA issues if the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see* also *United States v. Kimler*, 150 F.3d 429, 431 (5th Cir. 1998). "A petitioner can meet this burden by demonstrating that 'the issues [presented] are debatable among jurists of reason; that a court could resolve the issues in a different manner; or that the questions are adequate to deserve encouragement to proceed further.' " *Little v. Johnson*, 162 F.3d 855, 859 (5th Cir. 1998) (alteration in original) (quoting *Barefoot v. Estelle*, 103 S. Ct. 3383, 3394-95 & n.4 (1983)), *cert. denied*, 119 S. Ct. 1768 (1999). "The nature of the penalty in a capital case is a 'proper consideration in determining whether to issue a [COA], but the severity of the penalty does not in itself suffice to warrant the automatic issuing of a certificate.' " *Id.* (quoting *Barefoot*, 103 S. Ct. at 3394-95).

Penry's disagreement is not with this court's statement of the legal standard for granting a COA, but rather the application of that standard. In its prior Memorandum and Order, this court found that "Penry has failed to make a 'substantial showing of the denial of a constitutional right' " "because . . . each of his claims is foreclosed by clear, binding precedent, often recently decided."

(Docket Entry No. 33, p. 156). Penry asserts that the merits of some of his claims are "debatable among jurists of reason" because support for these claims has come from "Judges and Justices from the Supreme Court, Fifth Circuit, and the Texas Court of Criminal Appeals," although the support is found only in concurring and dissenting opinions. (Docket Entry No. 37, p. 4).[1] Penry argues that "[t]o deny [him] a certificate of appealability is implicitly to call into question the *reasonableness* of some of the country's greatest legal minds." (*Id.*).

Penry's approach to the legal standard for the issuance of COAs overstates the basis, and understates the purpose, of a COA. Courts deny COAs on issues that have sparked vigorous disagreement among judges, but have been decided, even without consensus among all "jurists of reason."

In *Little v. Johnson*, the petitioner requested a Certificate of Probable Cause ("CPC")[2] on a due process claim

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[1] Penry identifies the following jurists as those supporting his "most important claims": *Brown v. Texas*, 118 S. Ct. 355 (1997) (Stevens, J.; Souter, J.; Ginsburg, J.; Breyer, J.) (respecting the denial of the petition for writ of certiorari); *Whitaker v. State*, 977 S.W.2d 595, 601-02 (Tex. Crim. App. 1998) (Price, J., concurring), *cert. denied*, 119 S. Ct. 878 (1999); *May v. Collins*, 904 F.2d 228, 232-33 (5th Cir. 1990) (Reaveley, J. and King, J., concurring). (Docket Entry No. 37, p. 4).

[2] In Section 102 of the AEDPA, Congress amended 28 U.S.C. § 2253 to provide that a COA, rather than a CPC, is the appropriate mechanism for allowing a habeas petitioner to appeal a final judgment from a federal district court. "The standard for obtaining a COA is the same as for a CPC." *Muniz v. Johnson*, 114 F.3d 43, 45 (5th Cir. 1997); *Murphy v. Johnson*, 110 F.3d 10, 11 (5th Cir. 1997). However, "a COA, unlike a CPC, must

based on the admission of psychiatric testimony on the potential for future dangerousness in the sentencing phase of his capital trial. The testimony was based on a hypothetical set of facts. *See* 162 F.3d at 862-63. The Fifth Circuit declined to issue the CPC, despite the fact that three Supreme Court justices – Justices Blackmun, Brennan, and Marshall – had previously found that such psychiatric testimony was constitutionally defective. *See Barefoot*, 103 S. Ct. at 3406-18 (Blackmun, J., dissenting).

In *Trevino v. Johnson*, 168 F.3d 173, 180 (5th Cir. 1999), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. June 17, 1999) (No. 98-9936), the petitioner requested a COA on his claim that his state habeas proceedings violated his due process rights. The Fifth Circuit did not grant the petitioner the COA, because "[o]ur circuit precedent makes clear that [petitioner's] 'claim fails because infirmities in state habeas proceedings do not constitute grounds for relief in federal court.' " *Id.* at 180 (quoting *Hallmark v. Johnson*, 118 F.3d 1073, 1080 (5th Cir.), *cert. denied sub nom. Johnson v. Monroe*, 118 S. Ct. 576 (1997)). The Fifth Circuit observed that five of the six circuits that had considered the issue had arrived at the same conclusion. *See id.* The fact that a United States court of appeals had disagreed did not prevent the Fifth Circuit from denying the petitioner a COA.

In *Castillo v. Johnson*, 141 F.3d 218 (5th Cir.), *cert. denied*, 119 S. Ct. 28 (1998), the petitioner claimed that his federal constitutional rights were violated by the state

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"indicate which specific issue or issues satisfy the showing required. . . . "' *Murphy*, 110 F.3d at 11 n.1 (quoting 28 U.S.C. § 2253(c)(3)).

trial court's exclusion of polygraph evidence, a decision based on a state law *per se* bar on such evidence. Citing *United States v. Sheffer*, 118 S. Ct. 1261 (1998), the Fifth Circuit found that a *per se* rule against the admission of polygraph evidence did not violate the Fifth or Sixth Amendment rights of the accused to present a defense. *See id.* at 222. The Fifth Circuit declined to issue the petitioner a CPC, notwithstanding the fact that Justice Stevens dissented from the Supreme Court's opinion approving a *per se* bar on polygraph evidence. *See Sheffer*, 118 S. Ct. at 1270-79 (Stevens, J., dissenting).

In *Barber v. Johnson*, 145 F.3d 234 (5th Cir.), *cert. denied*, 119 S. Ct. 518 (1998), the petitioner had been convicted of capital murder and sentenced to death. The petitioner petitioned for state habeas relief, asserting error in the admission of certain psychiatric testimony. The Texas Court of Criminal Appeals denied that relief because it found any error to be harmless. *See Barber v. State*, 757 S.W.2d 359 (Tex. Crim. App. 1988). The petitioner unsuccessfully sought habeas relief in federal district court. In his appeal to the Fifth Circuit, the petitioner complained that the Texas Court of Criminal Appeals and the district court mistakenly applied the harmless error standard articulated in *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993), rather than the standard set out in *Chapman v. California*, 87 S. Ct. 824 (1967). Noting that a prior panel, *Hogue v. Johnson*, 131 F.3d 466 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1297 (1998), had already decided the issue, the Fifth Circuit denied the petitioner's request for a CPC, even though the "holding in *Hogue* may be viewed as inconsistent with the Supreme Court's underlying reasoning for applying the *Brecht* standard in federal habeas

review." *Barber*, 145 F.3d at 236. The *Barber* court disagreed with the holding of a prior Fifth Circuit panel, yet declined to issue a CPC because the prior panel's decision was binding. *See id.* at 237.

In *Boyd v. Johnson*, 167 F.3d 907 (5th Cir. 1999), *cert. denied*, ___ S. Ct. ___, 1999 WL 412897 (U.S. Aug. 5, 1999), the Fifth Circuit considered the petitioner's request for a CPC on his *Simmons* claim.[3] Penry asserted a similar claim in this case and now argues that it is especially worthy of a COA. The Fifth Circuit denied the request for a CPC in *Boyd*. In *Boyd*, as in this case, petitioner asserted that the trial court erred by permitting the prosecutor to argue future dangerousness while denying petitioners the opportunity to present evidence and argue that if the jury imposed a sentence, parole would not be likely. In *Boyd*, as in this case, petitioner relied on a dissent from the denial of *certiorari* in *Brown v. Texas*, 118 S. Ct. 355 (1997) (Stevens, J., dissenting from the denial of the petition for a writ of *certiorari*). Four justices joined in the dissent. In the dissenting opinion, Justice Stevens noted the "obvious tension" between *Simmons* and the refusal by

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[3] In *Simmons v. South Carolina*, 114 S. Ct. 2187, 2190 (1994), the Supreme Court held that when a capital murder defendant would be ineligible for parole under state law if sentenced to life imprisonment, and the prosecution argues that the defendant would be dangerous in the future, due process requires the jury to be informed that the defendant would be ineligible for parole. The Fifth Circuit has rejected the extension of the *Simmons* rule to a Texas capital defendant. *See Allridge v. Scott*, 41 F.3d 213, 222 (5th Cir. 1994). Under Texas law, a capital defendant is not legally ineligible for parole. The Fifth Circuit held that *Simmons* applies only to situations in which the defendant is "legally ineligible" for parole. *Id.* at 222.

the State of Texas to allow a defendant to give the jury truthful information about his parole eligibility, observing that this tension made the Texas capital punishment scheme "especially troubling." *See id.* at 355-56. The *Boyd* court declined to grant a CPC on the *Simmons* claim, despite the dissent by four members of the Supreme Court from the denial of petition for a writ of *certiorari* in *Brown*. *See* 167 F.3d at 912-13.

Penry's argument would appear to require that a COA issue in every appeal from a denial of habeas in a capital case. There have been, and are, individuals and jurists of reason who find capital punishment unconstitutional in any case, as a violation of basic moral standards of decency. Penry echoed this argument in his habeas petition, particularly as applied to the execution of those with the impairments Penry presents. However, it is clear that the disagreement by jurists of reason over the constitutionality of capital punishment does not require a COA in every capital case.

COAs should be granted on an issue presented in the habeas petition that is not settled. *See Drinkard v. Johnson*, 97 F.3d 751, 756 n.6, 770 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 1114 (1997), *overruled on other grounds by Lindh v. Murphy*, 117 S. Ct. 2059 (1997).[4] However, habeas petitioners cannot obtain a COA by finding support for their

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[4] There is some authority suggesting that a significant circuit split might also warrant the issuance of a COA, even when there is binding authority in the circuit of the court considering the COA request.

In *Lozada v. Deeds*, 111 S. Ct. 860 (1991) (per curiam), a Nevada District Court and the Ninth Circuit denied the petitioner's request for a CPC. *See* 111 S. Ct. at 861. The Supreme Court found that the Ninth Circuit erred in denying the petitioner a CPC, because at least two circuit courts had resolved the habeas claim at issue in a different manner. *See id.*

In *Lynce v. Mathis*, 117 S. Ct. 891 (1997), the petitioner's request for a CPC on his *ex post facto* claim had been denied by a Florida district court based on clear Florida and Eleventh Circuit precedent. *See* 117 S. Ct. at 893. The Eleventh Circuit also denied the petitioner a CPC in an unpublished order. Noting that the Tenth Circuit had "reached a different conclusion on similar facts," the Supreme Court granted certiorari and reversed the Eleventh Circuit. *See id.*

This court does not reach the issue of whether this situation requires the issuance of a COA. None of Penry's claims is supported by a binding majority decision of any circuit court.

claims in concurring or dissenting opinions, in the face of binding majority decisions adverse to their claims.

Penry's claims are foreclosed by clear, binding Fifth Circuit precedent. His claims have not attracted the support of a majority in any other circuit. Penry is not entitled to a COA as to such issues.

B. The Mitigation Instruction Claim

In Penry's federal habeas challenge to his first trial and conviction, the Supreme Court granted relief after finding that none of the three special issues set out in article 37.071(b) of the Texas Code of Criminal Procedure provided a means for the jury to give effect to Penry's mitigating evidence. *See Penry v. Lynaugh*, 109 S. Ct. 2934, 2949 (1989) ("*Penry I*"). During the sentencing phase of Penry's retrial, the jury was again asked to answer the

same special issues.[5] In the retrial, however, the trial judge provided the jury with an instruction on how to incorporate Penry's mitigating evidence into its sentencing decision. In this habeas challenge, Penry claims that this instruction was insufficient to cure the constitutional deficiencies identified by the Supreme Court in *Penry I*.

This court analyzed the jury instruction, Penry's presentation of extensive mitigating evidence, and defense counsel's jury arguments. In *Emery v. Johnson*, 139 F.3d 191 (5th Cir. 1997), *cert. denied*, 119 S. Ct. 418 (1998), the Fifth Circuit had approved an instruction similar to the

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[5] The special issues that the jury was asked to answer included:

Special Issue No. 1

Was the conduct of the defendant, JOHNNY PAUL PENRY, that caused the death of the deceased, PAMELA CARPENTER, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?

Special Issue No. 2

Is there a probability that the defendant, JOHNNY PAUL PENRY, would commit criminal acts of violence that would constitute a continuing threat to society?

Special Issue No. 3

Was the conduct of the defendant, JOHNNY PAUL PENRY, in killing PAMELA CARPENTER, the deceased, unreasonable in response to the provocation, if any, by the deceased?

(Trans. Vol. 5, pp. 1330-31).

one at issue in Penry's retrial.[6] This court held that in the sentencing phase of Penry's second trial, the jury was able to give "constitutionally sufficient consideration to Penry's mitigating evidence." (Docket Entry No. 33, p. 24).

Penry now asks this court to reconsider its ruling. Penry asserts that jury instruction given in his retrial was defective in that it did not place his mitigating evidence within the effective reach of the jury; that the defects in the jury instruction were not present in the instruction at issue in *Emery*; and that these defects could not be cured

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[6] In *Emery*, the jury was instructed as follows:

> [Y]our answers to the Special Issues, which determine the punishment to be assessed the defendant by the court, should be reflective of your finding as to the personal moral culpability of the defendant in this case.
>
> When you deliberate about the questions posed in the Special Issues, you are to consider any mitigating circumstances supported by the evidence presented in both phases of the trial. A mitigating circumstance may be any aspect of the defendant's background, character, and record, or circumstances of the crime, which you believe makes a sentence of death inappropriate in this case. If you find that there are any mitigating circumstances, you must decide how much weight they deserve and give them effect when you answer the special issues. If you determine, in consideration of this evidence, that a life sentence, rather than a death sentence, is an appropriate response to the personal moral culpability of the defendant, you are instructed to answer the Special Issue under consideration "No".

Emery, 139 F.3d at 200.

by arguments of counsel or by the presentation of mitigating evidence.

In Penry's retrial, the trial court gave the following instruction to the jury:

> You are instructed that if you return an affirmative finding on each of the special issues submitted to you, the court shall sentence the defendant to death. You are further instructed that if you return a negative finding on any special issue submitted to you, the court shall sentence the defendant to the Texas Department of Corrections for life. You are therefore instructed that your answers to the special issues, which determine the punishment to be assessed the defendant by the court, should be reflective of your finding as to the personal culpability of the defendant, JOHNNY PAUL PENRY, in this case.
>
> You are instructed that when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating

> evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

(Trans. Vol. 5, p. 1329).

Penry asserts that this instruction has two flaws not present in the jury instruction given in *Emery*.[7] First, Penry's jury was instructed to give a negative finding to one of the special issues only if the jury determined that a "life sentence . . . , rather than a death sentence, is an appropriate response to the *personal culpability* of the defendant." (*Id.* (emphasis added)). The *Emery* instruction, by contrast, asked the jury to consider the "personal *moral* culpability" of the defendant. Penry asserts that the phrase "personal culpability of the defendant," without the word "*moral*," might lead the jurors to believe that they could "only consider whether Penry is 'personally' culpable, or responsible, for the crime itself – not whether there is anything in the 'defendant's background, character, or other circumstances that reflect a reduced *moral* capability.' " (Docket Entry No. 37, p. 17 (quoting *Boyd v. Johnson*, 167 F.3d 907, 911 (5th Cir. 1999))).

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[7] To the extent that Penry's claim rests on a challenge to the constitutionality of a "nullification instruction," rather than on the differences between his instruction and the one given in *Emery*, this claim is foreclosed by *Emery*. *See Emery*, 139 F.3d at 199-200; *Gribble v. Johnson*, 8 F. Supp. 2d 942, 956-57 (S.D. Tex. 1998); *see also Wheatfall v. State*, 882 S.W.2d 829, 841 (Tex. Crim. App. 1994); *Coble v. State*, 871 S.W.2d 192, 206 (Tex. Crim. App. 1993) (en banc); *Fuller v. State*, 829 S.W.2d 191, 209 (Tex. Crim. App. 1992).

The Supreme Court in *Penry I* approved the use of the term "personal culpability" with reference to mitigating evidence. The Court noted that a jury must be able to consider and give effect to mitigating evidence "because the punishment should be directly related to the *personal culpability* of the defendant." *Penry I*, 109 S. Ct. at 2951 (emphasis added). In addition, in the following passage, the Court used the concepts of personal culpability and moral culpability interchangeably:

> *Personal culpability* is not solely a function of a defendant's capacity to act "deliberately." A rational juror at the penalty phase of the trial could have concluded, in light of Penry's confession, that he deliberately killed Pamela Carpenter to escape detection. Because Penry was mentally retarded, however, and thus less able than a normal adult to control his impulses or to evaluate the consequences of his conduct, and because of his history of childhood abuse, that same juror could also conclude that Penry was *less morally "culpable* than defendants who have no such excuse," but who acted "deliberately" as that term is commonly understood.

Penry I, 109 S. Ct. at 2949 (emphasis added) (citing *California v. Brown*, 107 S. Ct. 837, 841 (1987) (O. Connor, J., concurring)). The absence of the word "moral" in Penry's instruction does not make the instruction constitutionally defective.

Penry also challenges the last sentence of the jury charge as constitutionally defective. The judge instructed the jury that: "[i]f you determine, when giving effect to the mitigating evidence, if any, that a life sentence, *as reflected by a negative finding to the issue under consideration,*

rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues." (Trans. Vol. 5, p. 1329) (emphasis added). Penry argues that the phrase, "as reflected by a negative finding to the issue under consideration," a phrase not found in the *Emery* jury charge, "brings the *Penry* violation around full-circle to what it was in *Penry I*. If, according to the court's instruction, a life sentence is only appropriate if there is a 'negative finding to the issue under consideration', then Penry might as well not have had a *Penry* instruction, because the instruction only allows the jury to grant a life sentence if the honest answer to one of the three special questions is 'no.'" (Docket Entry No. 37, pp. 17-18).

The Supreme Court has admonished that courts are "not [to] engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would – with a 'commonsense understanding of the instructions in the light of all that has taken place at the trial.' " *Johnson v. Texas*, 113 S. Ct. 2658, 2669 (1993) (quoting *Boyde v. California*, 110 S. Ct.1190, 1198 (1990)). The standard for determining whether instructions adequately permit a jury to consider and give effect to mitigating evidence is " 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.' " *Buchanan v. Angelone*, 118 S. Ct. 757, 761 (1998) (quoting *Boyde*, 110 S. Ct. at 1198). Penry need not prove that "it was more likely than not that the jury was prevented from giving effect to the [mitigating] evidence, [but] the standard

requires more than a mere possibility of such a bar." *Johnson v. Texas*, 113 S. Ct. at 2669.

Before reaching the disputed sentence, the trial court informed the jury that:

> You are instructed that if you return an affirmative finding on each of the special issues submitted to you, the court shall sentence the defendant to death. You are further instructed that if you return a negative finding on any special issue submitted to you, the court shall sentence the defendant to the Texas Department of Corrections for life. You are therefore instructed that *your answers to the special issues, which determine the punishment to be assessed the defendant by the court, should be reflective of your finding as to the personal culpability of the defendant*, JOHNNY PAUL PENRY, in this case.
>
> You are instructed that *when you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case.* If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, *give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue.*

(Trans. Vol. 5, p. 1329) (emphasis added). Examining the charge in its entirety, the last sentence told the jury how

to effectuate a life sentence, if that was the punishment the jury deemed appropriate in light of Penry's mitigating evidence. The charge as a whole removes the confusion resulting from viewing the challenged phrase in isolation.

"Even were [this court] to entertain some doubt as to the clarity of the instructions, [this court held that] the entire context in which the instructions were given expressly informed the jury that it could consider mitigating evidence." *Buchanan*, 118 S. Ct. at 762. This court analyzed Penry's counsel's closing arguments in the sentencing phase of the trial, as well as the presentation of Penry's extensive mitigating evidence in both the guilt and sentencing phases of the trial. Penry now asserts that this court erred in considering these factors.

The Supreme Court has held that constitutionality of jury instructions depends upon "the entire context in which the instructions were given." *Buchanan*, 118 S. Ct. at 762; *see also Boyde*, 110 S. Ct. at 1199-1200. As Penry concedes, (Docket Entry No. 37, p. 11), and as both the Supreme Court and Fifth Circuit have held, jury arguments explaining how mitigating evidence can or should be considered in sentencing are part of this "context" and can affect whether the jury likely applied the instructions so as to present consideration of relevant mitigating evidence. *See Buchanan*, 118 S. Ct. at 762-63; *Drinkard*, 97 F.3d at 761 n.16 ("The arguments of counsel are relevant to a jury's interpretation of challenged jury instructions, but the court's instructions carry substantially more weight."). Penry correctly observes that the arguments of counsel cannot cure an otherwise unconstitutional jury charge. However, as explained above, that situation was

not present here. In this case, the jury received constitutional jury instructions that were further clarified by the arguments of Penry's counsel. This court properly considered these jury arguments in examining the "entire context in which the instructions were given."

Penry also argues that this court erred in stating that Penry's presentation of extensive mitigating evidence would likely convey to the jury that they may take the evidence into account in sentencing. Three times in the last decade, the Supreme Court has held that the defendant's presentation of mitigating evidence is relevant to determining how a jury would understand a given instruction. *See Buchanan*, 118 S. Ct. at 762-63 ("[T]here were two days of testimony relating to petitioner's family background and mental and emotional problems. It is not likely that the jury would disregard this extensive testimony in making its decision, particularly given the instruction to consider 'all the evidence.' "); *Johnson v. Texas*, 113 S. Ct. at 2669 ("It strains credulity to suppose that the jury would have viewed the evidence of petitioner's youth as outside its effective reach in answering the second special issue."); *Boyde*, 110 S. Ct. at 1199-1200 ("All of the defense evidence presented at the penalty phase – four days of testimony consuming over 400 pages of trial transcript – related to petitioner's background and character, and we think it unlikely that reasonable jurors would believe that the court's instructions transformed all of this favorable testimony into a virtual charade.") (internal quotation omitted).[8]

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[8] The position Penry takes in this case has been presented only in a dissenting opinion. *See Buchanan*, 118 S. Ct. at 766 (Breyer, J., dissenting) ("[T]he presentation of evidence does not tell the jury that the evidence presented can be taken into account – particularly in the context of an instruction that seems to exclude the evidence from the universe of relevant considerations.").

This court recognizes that the presentation of mitigating evidence alone cannot cure a *Penry* error. Under that approach, Penry would not have been entitled to habeas relief in his first habeas challenge. As the *Boyde* Court explained: "[p]resentation of mitigating evidence alone, of course, does not guarantee that a jury will feel entitled to consider that evidence. But the introduction without objection of volumes of mitigating evidence certainly is relevant to deciding how a jury would understand an instruction which is at worst ambiguous." *Boyde*, 110 S. Ct. at 1200.

Penry attempts to distinguish *Buchanan*, *Johnson*, and *Boyde* by pointing to a passage in *Johnson*, in which the Court distinguished *Penry I*. The *Johnson* Court observed that in that case, the petitioner's mitigating evidence was relevant to the second special issue, while in *Penry I*, Penry's mitigating evidence could not be given effect under the special issues. *See* 113 S. Ct. at 2669-70. This distinction applied to Penry's first trial, not his second. During Penry's retrial, the jury instructions brought Penry's mitigating evidence within the effective reach of the jury. The Supreme Court has expressly instructed courts to consider the nature and extent of the mitigating

evidence presented in "deciding how a jury would understand an instruction which is at worst ambiguous." *Boyde*, 110 S. Ct. at 1200.[9]

This court finds that there was not "a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence" and DENIES Penry's motion to alter and amend the judgment on his mitigation instruction claim.

II. Conclusion

This court DENIES Penry's motion to alter and amend the judgment.

SIGNED on August 12, 1999, at Houston, Texas.

Lee H. Rosenthal
United States District Judge

[9] This court recognizes that the approach is inherently somewhat circular. While courts are to consider the overall context in which jury instructions are given (including the jury arguments and the presentation of mitigating evidence) in deciding whether a jury instruction is constitutional, courts must make a preliminary finding that the challenged instruction is constitutional, or at worst ambiguous, before considering these factors. The only way to avoid this potential circularity is to assume that the overall context can only be considered when jury instructions are ambiguous, not when instructions are facially unconstitutional.

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 99-20868

JOHNNY PAUL PENRY

Petitioner-Appellant,

VERSUS

GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas, Houston Division

Before DAVIS, EMILIO M. GARZA, and DENNIS, Circuit Judges. W. EUGENE DAVIS, Circuit Judge:

Penry filed a motion for a certificate of appealability (COA) in this § 2254 capital habeas proceeding, alleging various constitutional violations. For the reasons that follow, we deny his motion.

I.

Penry was convicted of capital murder and sentenced to death in Texas state court for the rape and murder of Pamela Carpenter. Penry raped Carpenter and stabbed her with a pair of scissors. He had met her several weeks earlier while helping to install appliances in her home.

Penry matched the description Carpenter gave of her attacker before she died. After being given his Miranda warnings, Penry gave an oral confession and later a signed confession to the rape and murder. At trial, Penry offered mitigating evidence that he was mentally retarded and abused as a child. He was convicted and sentenced to death. The United States Supreme Court granted federal habeas relief and vacated his sentence, holding that Penry's rights were violated by jury instructions the trial court gave at the punishment phase of his trial.[1]

The court found that none of the three special statutory questions provided to the jury, under Texas law, allowed the jury to give effect to Penry's mitigating evidence. "The jury was never instructed that it could consider the evidence offered by Penry as mitigating evidence and that it could give mitigating effect to that evidence." *Penry I*, 492 U.S. at 320; 109 S.Ct. at 2947.

In the second trial, the trial court followed the Texas statutory scheme and gave the jury the same three special questions it had given the jury in the first trial. However, the judge also provided supplemental instructions directing the jury to consider any other relevant mitigating evidence and explained how to give effect to that evidence. Penry was again convicted of capital murder and sentenced to death. The sentence was again affirmed on direct appeal[2] and state habeas relief was denied. The

[1] *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934 (1989) ("*Penry I*").

[2] *Penry v. State*, 903 S.W.2d 715 (Tex. Crim. App. 1995).

district court also denied Penry's application for a COA. Penry now seeks a COA from this court. We granted Penry's motion for a stay of execution, in order to consider his motion for a COA.

II.

A COA may only issue if the petitioner makes a "substantial showing of the denial of a constitutional right."[3] This burden can be met if the issues presented "are debatable among jurists of reason; . . . a court could resolve the issues in a different manner; or . . . the questions are adequate to deserve encouragement to proceed further."[4]

A death sentence alone does not justify the automatic issuance of a COA, although it is a proper consideration.[5] Any doubts as to whether the COA should issue are to be resolved in the petitioner's favor.[6]

Penry's petition was filed after the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA).

[3] 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 120 S.Ct. 1595, 1603 (2000); *United States v. Kimler*, 150 F.3d 429, 431 (5th Cir. 1998).

[4] *Miller v. Johnson*, 200 F.3d 274, 280 (5th Cir. 2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4, 103 S.Ct. 3383, 3394 n.4 (1983)); *Hicks v. Johnson*, 186 F.3d 634, 636 (5th Cir. 1999), cert denied 120 S.Ct. 976 (2000); *see also Slack*, 120 S.Ct. at 1603-4 (*quoting Barefoot v. Estelle*, 463 U.S. 880, 893 and n. 4, 103 S.Ct. 3383).

[5] *Lamb v. Johnson*, 179 F.3d 352, 356 (5th Cir. 1999), cert denied 120 S.Ct. 522 (1999).

[6] *Id.*

Thus, for questions of law or mixed questions of law and fact adjudicated on the merits in state court, we may grant federal habeas relief under 28 U.S.C. § 2254(d)(1) only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established [Supreme Court precedent]."[7] A state court decision is "contrary to" Supreme Court precedent if: (1) the state court's conclusion is "opposite to that reached by [the Supreme Court] on a question of law" or (2) the "state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent" and arrives at an opposite result. *Williams v. Taylor*, 2000 WL 385369, at *23 (U.S. Apr. 18, 2000). A state court unreasonably applies Supreme Court precedent if: (1) it unreasonably applies the correct legal rule to the facts of a particular case or (2) it "unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at *25. In deciding whether a state court's application was unreasonable, this court considers whether the application was "objectively unreasonable." *Id.* at *26. We now turn to Penry's specific arguments on appeal.

III.

Penry first argues that the jury instructions given during the punishment phase of his trial did not allow the jury to consider and give effect to mitigating evidence

[7] *See Miller*, 200 F.3d at 280-81.

regarding his alleged mental retardation and severe child abuse; thus, the instructions violated the Supreme Court's directive in *Penry v. Lynaugh*,[8] ("*Penry I*"). Penry explains that jurors could only give effect to his mitigating evidence, as the Supreme Court required in *Penry I*, and grant him a life sentence if they found that the evidence fit under one of the three special questions required by Texas law.[9] In *Penry I*, Penry's federal habeas challenge to his first trial and conviction, the Supreme Court found that, under the trial court's instruction, none of the three special statutory questions allowed the jury to give effect to Penry's mitigating evidence. At Penry's retrial, however, the trial court supplemented the instruction it gave in *Penry I*. The court instructed the jury to consider any mitigating circumstances supported by the evidence. The instruction stated, in part:

> [W]hen you deliberate on the questions posed in the special issues, you are to consider mitigating circumstances, if any, supported by the evidence . . . . A mitigating circumstance may include, but is not limited to, any aspect of the

[8] 492 U.S. 302, 109 S.Ct. 2934 (1989).

[9] The three questions were: 1. Was the conduct of the defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would result? 2. Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society? 3. Was the conduct of the defendant in killing the deceased unreasonable in response to the provocation, if any, by the deceased? Since *Penry*, the statute has been revised to add a fourth question concerning mitigation.

defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find . . . any mitigating circumstances . . . you must decide how much weight they deserve, if any, and . . . give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.

Penry correctly contends that the instruction still required the jury to give a negative answer to one of the three special issues in order for Penry to receive a life sentence. Penry argues that because childhood abuse and mental retardation do not necessarily fit within the scope of any of the special issues, this instruction did not allow the jury to give effect to these mitigating circumstances. However, on direct appeal, the Texas Court of Criminal Appeals found that the instruction satisfied the requirements of *Penry I*, and allowed the jury to give effect to those mitigating circumstances.[10]

We agree with the district court that the Texas Court of Criminal Appeals' holding that the challenged instruction was constitutional was not an unreasonable application of clearly established law, namely *Penry I*. The

[10] *Penry v. State*, 903 S.W.2d 715, 765 (Tex. Crim. App. 1995).

instruction directed the jury to consider and give effect to any mitigating circumstances supported by the evidence by answering "no" to one of the special issues if they felt a life sentence was appropriate. This instruction satisfied the deficiency in the trial court's instruction identified in *Penry I*: "[t]he jury was never instructed that it could consider the evidence offered by Penry as mitigating evidence and that it could give mitigating effect to that evidence in imposing sentence."[11]

We are not writing on a clean slate on this issue. This court approved identical jury instructions on this point in *Miller*[12] and *Emery v. Johnson*.[13] In *Miller*, we concluded that the defendant failed to show that the same instructions given by the trial court in this case violated *Penry I*. We rejected the argument that the jury was prevented from considering the mitigating evidence.[14] "Miller's jury, unlike Penry's, was instructed that it should consider mitigating evidence when deliberating on the special issues. . . . [It] was instructed that if it determined when giving effect to the mitigating evidence, if any, that a life sentence rather than a death sentence was an appropriate response to Miller's personal culpability, a negative finding should be given to the special issue under consideration."[15]

[11] *Penry*, 492 U.S. at 320, 109 S.Ct. at 2947.

[12] 200 F.3d 274.

[13] 139 F.3d 191 (5th Cir. 1997), cert denied 119 S.Ct. 418 (1998).

[14] 200 F.3d at 290.

[15] *Miller*, 200 F.3d at 290.

In the alternative, Penry argues that the jury charge was a "nullification instruction" and was therefore unconstitutional insofar as it instructed jurors to violate their oaths by rendering an untruthful answer to one of the special issues if they wished to give effect to the mitigating evidence presented in this case. We disagree. The jury was not told to disregard the law; rather, it was instructed on how to obey the law, as explained by the Supreme Court in *Penry I*.

IV.

Next, Penry argues that the admission of certain psychiatric testimony and evidence offered by the state at trial violated his Fifth and Sixth Amendment rights.

A.

Penry' s Fifth Amendment challenge involves three categories of psychiatric testimony and evidence presented by the state:1. the testimony of Dr. Fason admitted during the guilt/innocence phase of trial; 2. the testimony of Dr. Quijano admitted during the punishment phase of trial; and 3. the report of Dr. Peebles describing a court-ordered examination of Penry, which was admitted at the punishment phase of trial.

1.

Penry's primary challenge is to the testimony of Dr. Fason. Penry contends that Fason's testimony was based on his court-ordered competency examination of Penry, and that the state's use of the testimony to argue future

dangerousness during the punishment phase violated Penry's rights under *Estelle v. Smith*.[16] More particularly, Penry argues that his Fifth Amendment privilege against compelled self-incrimination was violated because he was not advised before Dr. Fason's examination of his right to remain silent and that his statements could be used against him at the sentencing proceeding.

On direct appeal, the Texas Court of Criminal Appeals found that Dr. Fason's testimony fell within the *Buchanan v. Kentucky*[17] exception to *Estelle*. Under *Buchanan*, if a defendant presents psychiatric evidence, then the prosecution may present rebuttal psychiatric evidence without violating the Fifth Amendment.

Penry contends that, as applied to this case, proper rebuttal evidence under *Buchanan* is limited to evidence tending to prove that Penry is not mentally retarded, and that the state's evidence went beyond that scope. After a careful review of the record, we find that Fason's testimony did fall within the *Buchanan* exception.

At the guilt/innocence phase of trial, Penry offered various psychological records, including reports of his performance on a number of psychological and IQ tests. The records also included observations of his emotional

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[16] 451 U.S. 454, 101 S.Ct. 1866 (1981). *Estelle* held that the defendant's Fifth Amendment right against compelled self-incrimination was violated because he was not told that any statements made during his competency exam could be used against him at the punishment phase on the issue of future dangerousness.

[17] 483 U.S. 402, 107 S.Ct. 2906 (1987).

status and social behavior. As demonstrated by the closing argument of Penry's attorney, one reason these records were introduced was to lay a predicate for an argument that Penry's confessions were not truly voluntary because Penry is mentally retarded and thus submissive to authority figures. The evidence was also offered to support Penry's argument that his mental retardation made him less likely to act with the intent required for capital murder.

Dr. Fason's testimony was introduced to rebut these arguments. Fason testified that Penry had an antisocial personality disorder. He explained how that condition could affect Penry's IQ scores, and that it was possible that Penry was not mentally retarded. Also, he testified that someone with an antisocial personality disorder would usually not be easily led by others and would likely disrespect and rebel against authority. Fason did not discuss any statements made by Penry during Fason's examination, except whether Penry was able to identify his attorney at the interview. We disagree with Penry's characterization of Fason's testimony as a "sham rebuttal" by the state in order to introduce to the jury the idea that Penry was a "psychopath." Penry's defense centered around his diminished capacity – his alleged mental retardation at the time of the offense – and the idea that his mental status rendered his confessions involuntary. Therefore, we conclude that the Court of Criminal Appeals' determination that Fason's testimony was proper rebuttal under *Buchanan* is neither contrary to nor

an unreasonable application of clearly established federal law.[18]

2.

In addition to his challenge to Dr. Fason's guilt phase testimony, Penry also challenges the court's admission, at the punishment phase, of the testimony of Dr. Quijano and the report of Dr. Peebles as violating *Estelle*.

At the punishment phase, Penry called various relatives and neighbors who testified that they believed Penry was mentally retarded and abused as a child. He also called Dr. Randall Price, who had reviewed certain portions of Penry's medical records, and had also administered various psychological tests to Penry. Dr. Price concluded that Penry had a brain impairment and was mentally retarded, and that the mental retardation could have influenced his involvement in criminal activity. Although he admitted that Penry had an antisocial history, he stated that Penry "looks more like people with brain damage . . . than those with antisocial personality."

In rebuttal, the state called Doctors Quijano and Samenow and introduced into evidence a number of Penry's mental health records. Dr. Quijano conducted a court-ordered competency examination of Penry. He testified that Penry had an antisocial personality disorder

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[18] *See Vardas v. Estelle*, 715 F.2d 206, 209-10 (5th Cir. 1983) (finding no violation of defendant's Fifth Amendment privilege because state psychiatrists' testimony was proper as rebuttal to defendant's insanity defense; psychiatrists testified that defendant was not insane, but instead was a sociopath.).

which made him more likely to be violent in the future. However, he testified that he based his opinion only on Penry's medical records including evaluations by others, and not on his own examination of Penry. Thus, the Texas Court of Criminal Appeals found no Fifth Amendment violation. This finding was not contrary to nor an unreasonable application of clearly established federal law.[19]

The report of Dr. Peebles was admitted into evidence during the punishment phase, and was based on Dr. Peebles, 1977 examination of Penry prior to his trial on an unrelated rape charge. The report determined that Penry would be dangerous in the future if released. At the time of Dr. Peebles' examination, Penry was not yet in custody on the instant capital charge, and thus could not have been warned about the potential use of his statements at the punishment phase of the capital trial. The Texas Court of Criminal Appeals found no Fifth Amendment violation because Penry's attorney had requested the examination;

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[19] *See Williams v. Lynaugh*, 809 F.2d 1063, 1068 (5th Cir. 1987) (finding no factual basis for Fifth Amendment violation where state psychologist's testimony on future dangerousness was not based on his interview with the defendant.) *See also Hughes v. Johnson*, 191 F.3d 607, 616-17 (5th Cir. 1999) (finding reasonable a state court's conclusion that psychiatrist's testimony did not violate *Estelle*, despite his having conducted a prior improper interview, because it did not influence his testimony; also rejecting idea that "taint" of prior improper interview created absolute bar to any expression of opinion by that psychiatrist); *cf. Flores v. Johnson*, 2000 WL 426212, at *1, * 7 – *13 (5th Cir. April 20, 2000) (Emilio M. Garza, J., specially concurring) (following but questioning Supreme Court authority allowing psychiatric testimony on future dangerousness deduced without examining the defendant).

thus, Dr. Peebles was acting as an agent of the defense, not of the state, in conducting his examination.[20] We cannot say that the court's conclusion was unreasonable or contrary to Supreme Court precedent.[21]

B.

Penry also argues that his Sixth Amendment right to effective assistance of counsel was violated by the use of testimony on future dangerousness from Doctors Quijano and Fason because Penry and his counsel were told that their examinations of him were solely for the purpose of determining competency. Under *Powell v. Texas*, "once a capital defendant is formally charged, the Sixth Amendment right to counsel precludes such an examination

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[20] *Penry*, 903 S.W.2d. at 759-60; *see Nelson v. State*, 848 S.W.2d 126, 135 (Tex. Crim. App. 1992); *Estelle*, 451 U.S. at 467-68, 101 S.Ct. at 1875-76 (noting that the defendant there did not initiate the examination and was not faced with a person acting solely in his interest).

[21] *See Buchanan v. Kentucky*, 483 U.S. 402, 422-23, 107 S.Ct. 2906, 2917-18 (1987) (finding that "if a defendant requests [the psychiatric] evaluation *or* presents psychiatric evidence . . . the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution."). (Emphasis added); *see also Schneider v. Lynaugh*, 835 F.2d 570, 577 (5th Cir. 1988) (finding that, under *Buchanan*, the fact that defendant requested the competency examination militated against the defendant's assertion of the Fifth Amendment privilege, particularly when defendant had also introduced psychological evidence.).

without first notifying counsel that 'the psychiatric examination [will] encompass the issue of their client's future dangerousness.' "[22] The Texas Court of Criminal Appeals concluded that Penry's attorney was "on notice that if he intended to put on a 'mental status' defense, he would have to anticipate the use of psychological evidence by the prosecution in rebuttal."[23] At a pretrial hearing, the trial court expressly warned Penry's counsel that the testimony of Doctors Fason and Quijano might be admissible at trial if the defense put on psychiatric evidence.[24] At trial, Penry argued that he was mentally retarded; thus his confessions were involuntary. He also argued that mental retardation could have been a contributing cause of Penry's violent criminal acts and that his mental retardation mitigated against the imposition of the death penalty. The state was entitled to rebut this evidence by offering psychiatric evidence that some condition other than mental retardation was a more sound explanation for Penry's conduct. Thus, the Court of Criminal Appeals' findings are not contrary to, nor an unreasonable application of, clearly established federal law.

V.

Penry next contends that his execution would violate the Eighth Amendment, based on his alleged mental retardation and severe child abuse. First, Penry makes a

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[22] 492 U.S. 680, 681, 109 S.Ct. 3146, 3148 (1989) (*quoting Estelle*, 451 U.S. at 471, 101 S.Ct. at 1877).

[23] *Penry*, 903 S.W.2d at 758.

[24] *Id.* at 759, n. 46.

general argument that execution of the mentally retarded is a per se violation of the Eighth Amendment. We agree with the district court that this claim is procedurally barred because Penry did not make the argument in state court. However, even if this claim was not procedurally barred, it has been rejected by the Supreme Court.[25]

Penry also argues that the death penalty would be cruel and unusual as applied to him personally, because of his mental retardation and severe childhood abuse. This argument also fails. On Penry's direct appeal, the Texas Court of Criminal Appeals (*citing Penry I*) concluded that constitutional requirements were met because the jury was able to consider and give effect to Penry's mitigating evidence before determining that the death sentence was appropriate.[26] In Penry's second trial, he presented extensive mitigating evidence and the jury was instructed to consider that evidence and told how to give it effect. More significantly, although Penry was the individual before the Supreme Court in *Penry I*, the Court did not suggest that his execution would be unconstitutional based on his mental retardation or childhood abuse. The Texas Court of Criminal Appeals' conclusion that Penry's execution would not violate the Eighth Amendment was neither contrary to nor an unreasonable application of clearly established Supreme Court precedent.

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[25] *See Andrew v. Collins*, 21 F.3d 612, 632 (5th Cir.1994). cert. denied 513 U.S. 1114, 115 S. t.908 (1995)(*citing Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934 (1989)).

[26] *Penry*, 903 S.W.2d at 766-67.

VI.

Penry makes several other arguments in support of his motion. He contends that: 1. the trial court violated his rights under *Simmons v. South Carolina*[27] by excluding his signed statement waiving any right to parole, while allowing the state to argue future dangerousness; 2. his confessions were taken involuntarily in violation of the Fifth Amendment; and 3. the jury instructions at his competency trial were unconstitutionally vague because they did not define the terms "reasonable," "rational," and "understanding." We find all of these arguments to be unpersuasive, essentially for the reasons given by the district court in its thorough opinion of March 29, 1999.

VII.

For the reasons stated above, we deny Penry's motion for a certificate of appealability. We also vacate the stay of execution previously entered by this court.

Dennis, J., dissenting:

In *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) (*"Penry I"*), the Supreme Court held that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. "The sentencer must also be able to consider and give effect to that evidence in imposing sentence." *Id.* at 319. Accordingly, the jury must be "instructed that it

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[27] 512 U.S. 154, 114 S.Ct. 2187 (1994).

could consider the evidence offered by Penry as mitigating evidence and that it could give mitigating effect to that evidence in imposing sentence." *Id.* at 320. The Court agreed with Penry "that his mitigating evidence of mental retardation and childhood abuse has relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its 'reasoned moral response' to that evidence in determining whether death was the appropriate punishment." *Id.* at 322.

Moreover, in *Penry I*, the Court stated that in the absence of a special jury instruction "defining 'deliberately' in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability . . . a juror who believed that Penry's retardation and background diminished his moral culpability and made imposition of the death penalty unwarranted would be unable to give effect to that conclusion if the juror also believed that Penry committed the crime 'deliberately.' " *Id.* at 323. Likewise, the Court observed, the mitigating evidence concerning Penry's mental retardation, which indicated his inability to learn from his mistakes, was relevant to the second issue only as an aggravating factor because it suggests a "yes" answer to the question of future dangerousness. *Id.* at 323. Consequently, the Court concluded, the second special issue "did not provide a vehicle for the jury to give mitigating effect to Penry's evidence of mental retardation and childhood abuse." *Id.* at 324. With respect to the third special issue, the Court stated, a juror who found that Penry's mental retardation and arrested emotional development rendered him less culpable for his crime than a normal adult would not necessarily conclude that

Penry's conduct was reasonable in response to the provocation, if any, by the deceased. "Thus", the Court reasoned, "a juror who believed Penry lacked the moral culpability to be sentenced to death could not express that view in answering the third special issue if she also concluded that Penry's action was not a reasonable response to provocation." *Id.* at 324-25.

In light of the prosecutor's argument to the jurors that, under their oath to follow the law, they must follow the instructions they were given in answering the special issues, the Court concluded that, "in the absence of appropriate jury instructions, a reasonable juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence." *Id.* at 326.

In *Penry I*, the State of Texas conceded at oral argument before the Supreme Court that if a juror concluded that Penry acted deliberately and was likely to be dangerous in the future, but also concluded that because of his mental retardation he was not sufficiently culpable to deserve the death penalty, that juror would be unable to give effect to that mitigating evidence under the instructions given in the case. *See id.* at 326. Finally, the Court held that "[i]n this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision." *Id.* at 328.

Justice Scalia, in his concurring and dissenting opinion in *Penry I*, criticized the majority's holding as follows:

> In providing for juries to consider all mitigating circumstances insofar as they bear upon (1) deliberateness, (2) future dangerousness, and (3) provocation, it seems to me Texas had adopted a rational scheme that meets the two concerns of our Eighth Amendment jurisprudence. The Court today demands that it be replaced, however, with a scheme that simply dumps before the jury all sympathetic factors bearing upon the defendant's background and character, and the circumstances of the offense, so that the jury may decide without further guidance whether he "lacked the moral culpability to be sentenced to death," *ante*, at 2950, "did not deserve to be sentenced to death," *ante*, at 2951, or "was not sufficiently culpable to deserve the death penalty," *ibid.* The Court seeks to dignify this by calling it a process that calls for a "reasoned moral response," *ante*, at 2949, 2951 – but reason has nothing to do with it, the Court having eliminated the structure that required reason. It is an unguided, emotional "moral response" that the Court demands be allowed – an outpouring of personal reaction to all the circumstances of a defendant's life and personality, an unfocused sympathy.

Id. at 359-60 (Scalia, J., concurring in part and dissenting in part).

The sentencing scheme and instructions adopted by Texas in Penry's second trial, the subject of the present case, do not satisfy the constitutional requirements described in *Penry I*. The jury was not clearly and directly instructed that it could consider and give effect to the

mitigating evidence of Penry's mental retardation, organic brain damage and abused background as a whole and beyond the scope of the special issues by declining to impose the death penalty. Texas did not replace its sentencing scheme with one which puts "before the jury all sympathetic factors bearing upon the defendant's background and character, and the circumstances of the offense, so that the jury may decide without further guidance whether he 'lacked the moral culpability to be sentenced to death[.]' " *Id.* at 360 (Scalia, J., concurring in part and dissenting in part). Instead, in the present case, the jury was instructed: "If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues." These instructions require the jury to consider and use only mitigating evidence relevant to the special issues, and permit the jury to decline to impose the death penalty only if that relevant mitigating evidence would cause the jury to change a "yes" answer to a "no." Therefore, the sentencing scheme used in Penry's second trial is subject to the same flaws pointed out by *Penry I*. It does not permit the jury to give effect to the mitigating evidence of retardation and abuse as a whole and beyond the scope of the special issues by declining to impose the

death penalty despite its findings of "yes" to the three special issues questions. The jury's consideration of the mitigating evidence of mental retardation, organic brain damage and extensive child abuse is still shackled and confined within the scope of the three special issues. Therefore, the trial court failed to comply with the dictates of the Supreme Court and again deprived the jury of the ability to give full and complete effect to Penry's mitigating evidence of mental retardation, brain damage and child abuse.

The Supreme Court in *Penry I* held that the jury was not adequately instructed to take into consideration all of Penry's mitigating evidence and that the terms in the Texas special issues were not defined in such a way that the jury could consider and give effect to all of his mitigating evidence in answering them. When the Court reversed and remanded for these reasons, the district court and this court became bound by the mandate rule. The mandate rule is not, strictly speaking, merely a matter of law of the case. *See United States v. Wells*, 519 U.S. 482, 488 n.4 (1997). On remand, the district court and the court of appeals owe obedience to the mandate of the Supreme Court and must carry it into effect. *See Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427-28 (1978) (once case is remanded, circuit court is bound by decree); Moore's Federal Practice 3d § 134.23[1][a].

Subsequently, the Supreme Court distinguished its holding from *Penry I* in cases involving other types of mitigating evidence. *See Johnson v. Texas*, 509 U.S. 350, 369 (1993) ("The evidence of petitioner's youth, however, falls outside Penry's ambit. Unlike Penry's mental retardation, which rendered him unable to learn from his

mistakes, the ill effects of youth that a defendant may experience are subject to change and, as a result, are readily comprehended as a mitigating factor in consideration of the second special issue."); *Graham v. Collins*, 506 U.S. 461, 475-76 (1993) ("The jury was not forbidden to accept the suggestion of Graham's lawyers that his brief spasm of criminal activity in May 1981 was properly viewed, in light of his youth, his background, and his character, as an aberration that was not likely to be repeated. Even if Graham's evidence, like Penry's, had significance beyond the scope of the first special issue, it is apparent that Graham's evidence – unlike Penry's – had mitigating relevance to the second special issue concerning his likely future dangerousness. Whereas Penry's evidence compelled an affirmative answer to that inquiry, despite its mitigating significance, Graham's evidence quite readily could have supported a negative answer."). Accordingly, we are still bound by the mandate and the holding of *Penry I* and must carry them into effect now in the present case.

Moreover, there is no circuit precedent which prevents this panel from owing obedience to the mandate and holding of *Penry I*. In our prior decisions, *Penry I* was not applicable because the proffered evidence either was not constitutionally mitigating evidence[28] or was not beyond the scope of the special issues or beyond the

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[28] *See Madden v. Collins*, 18 F.3d 304, 308 (5th Cir. 1994) (citing *Graham v. Collins*, 950 F.2d 1009, 1029 (5th Cir. 1992) (en banc)).

effective reach of the jurors,[29] or because the claim was procedurally barred.[30]

In *Graham* v. *Collins*, 950 F.2d 1009 (5th Cir. 1992) (en banc), this court explained that *Penry I* presented a "wholly different type of mitigating evidence. Not evidence of good character, but of bad character; not evidence of potential for rehabilitation, but of its absence; not evidence of a transitory condition, but of a permanent one; but nonetheless evidence which was strongly mitigating because these characteristics were due to the uniquely severe permanent handicaps with which the defendant was burdened through no fault of his own, mental retardation, organic brain damage and an abused childhood. There was no way this type of evidence could be given any mitigating force under the second special issue." *Id.* at 1029. This court in *Graham* observed that "*Penry* can fairly be read as precluding use of the Texas statutory scheme in any such situation. But, *Penry* can also fairly be read as addressing only a situation where some major mitigating thrust of the evidence is substantially beyond the scope of any of the [special] issues." *Id.* at 1027. Consequently, the use of the Texas statutory scheme was precluded in Penry's situation and this panel has a duty to carry into effect the mandate and holding of *Penry I*. For these reasons, I would grant Penry's application for a COA.

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[29] *See Graham v. Collins*, 950 F.2d 1009, 1029 (5th Cir. 1992) (en banc); *Miller v. Johnson*, 200 F.3d 274, 289-90 (5th Cir. 2000).

[30] *See Emery v. Johnson*, 139 F.3d 191, 199-200 (5th Cir. 1997).

I would also grant a certificate of appealability to consider the alleged violations of Penry's 5th and 6th Amendment rights. I share the concerns articulated by Judge Emilio M. Garza's special concurrence in *Flores v. Johnson*, 210 F.3d 456, 458-70 (5th Cir. 2000) (Judge Emilio M. Garza, specially concurring) and believe that Penry has made a substantial showing that the cumulative effect and reinforcement of the prohibited use of the Texas statutory scheme by the erroneous admission of the psychiatric testimony further violated his constitutional rights.

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 99-20868

JOHNNY PAUL PENRY

Petitioner-Appellant,

VERSUS

GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas, Houston Division

On Petition for Rehearing

Before DAVIS, EMILIO M. GARZA, and DENNIS, Circuit Judges. W. EUGENE DAVIS, Circuit Judge:

In his petition for rehearing, Penry contends for the first time that *Battie v. Estelle*, 655 F.2d 692 (5th Cir. 1981), controls the admissibility of the Peebles report. *Battie* was decided before *Buchanan v. Kentucky*, 483 U.S. 402, 107 S.Ct. 2906 (1987), and we explained in *Schneider v. Lynaugh*, 835 F.2d 570 (5th Cir. 1988), how *Buchanan* controls this issue when an accused requests an examination, particularly when he puts his mental status at issue. In *Schneider*, we stated that:

> Schneider requested the competency examination. Before *Buchanan*, we held that this fact

> "[did] not obviate the necessity for giving the Miranda warnings" when the examination extended beyond the subject of competency. [*Battie*, 655 F.2d at 702-3]. The Court in *Buchanan*, however, regarded such a request as militating against the defendant's assertion of the privilege, for it stated that "if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested."

835 F.2d at 577.

Because *Schneider*, rather than *Battie*, controls our decision on this issue, we DENY Penry's petition for panel rehearing.

Judge Dennis would GRANT the motion for panel rehearing.

No judge in regular, active service on the court having requested that the court be polled on Rehearing En Banc, (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

United States Circuit Judge

Supreme Court of the United States

Johnny Paul **PENRY**, petitioner,

v.

Gary L. **JOHNSON**, Director, Texas Department of Criminal Justice, Institutional Division.

No. 00-6677.

Nov. 27, 2000.

Case below, 215 F.3d 504.

Motion of petitioner for leave to proceed in forma pauperis and petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit granted.

(11)

No. 00-6677

Supreme Court, U.S.
FILED
JAN 11 2001
CLERK

In The

Supreme Court of the United States

JOHNNY PAUL PENRY,

Petitioner,

v.

GARY L. JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITIONER'S BRIEF

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January 11, 2001

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CAPITAL CASE
QUESTIONS PRESENTED

1. Was the trial court's submission to the jury of the same three "special issues" held to violate this defendant's constitutional rights in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) (*"Penry I"*), inconsistent with *Penry I* and other relevant decisions of this Court?

2. May a psychiatrist appointed by the court on motion of defense counsel whose report is used as evidence for the prosecution be an "agent of the state" for purposes of the Fifth Amendment holding of *Estelle* v. *Smith*, 451 U.S. 454 (1981)?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the denial of the application of petitioner ("Penry") for a writ of habeas corpus and Judge Dennis's dissenting opinion are reported at 215 F.3d 504. The opinion of the Court of Appeals denying Penry's petitions for rehearing and rehearing *en banc* (JA 1061[1]), the opinion of the United States District Court for the Southern District of Texas denying Penry's habeas petition (JA 865), and the opinion of the district court denying Penry's motion to alter and amend the judgment (JA 1018) are not reported. The opinion of the Texas Court of Criminal Appeals affirming Penry's conviction and death sentence is reported at 903 S.W.2d 715.

JURISDICTION

On June 20, 2000, the Court of Appeals entered judgment denying Penry's motion for a certificate of appealability ("COA") with respect to the District Court's denial of Penry's application for habeas corpus. By order filed July 25, 2000, the Court of Appeals denied Penry's petitions for rehearing and rehearing en banc. A petition for certiorari was timely filed on October 20, 2000, within 90 days of the order denying rehearing, and was granted by order of this Court dated November 27, 2000. This Court's jurisdiction rests on 28 U.S.C.A. § 1254(1) (1993).

[1] References to "JA" are to the Joint Appendix.

Penry first invoked federal court jurisdiction in this case under 28 U.S.C.A. § 2254 (1994 & Supp. 2000).

CONSTITUTIONAL PROVISIONS AND STATUTES AT ISSUE

This case involves the Fifth, Eighth and Fourteenth Amendments to the United States Constitution, current and former Tex. Crim. Proc. Code art. 37.071, Tex. Crim. Proc. Code art. 35.22 and Tex. Crim. Proc. Code art. 46.02. The text of these constitutional provisions and statutes is appended hereto.

STATEMENT OF THE CASE

A. Facts Relating to the *Penry I* Issue

The facts here are, in material respects, identical to those in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) (*"Penry I"*). Here, as in *Penry I*, Penry presented at his capital trial strong evidence of mental retardation and child abuse as a reason for imposing a sentence less than death. And here, as in *Penry I*, Penry was sentenced to death based on affirmative answers to three "special issues" which did not permit the jury to consider adequately his mental retardation and child abuse.

1. The Evidence of Mitigating Circumstances

The evidence of mitigating circumstances presented at Penry's second trial was, if anything, more compelling than the evidence before this Court in *Penry I*.

Results of I.Q. tests given to Penry over a period of 23 years were introduced in evidence, and ranged between 51 and 63. (JA 38, 40-41, 43-44, 52, 72-76, 427-34) (As the Court pointed out in *Penry I*, a person must have an I.Q. of 70 or below to be classified as mentally retarded. 492 U.S. at 308 n.1.) Penry attended a state school for retarded children from 1968 to 1971. (JA 50, 155-57) At the age of fifteen, Penry was given a test in which he was shown a picture of a hen and asked to choose among the words drum, hen, car and flower. He chose "drum." (JA 37) The evidence amply confirmed that, as this Court noted in *Penry I*, Penry "had the mental age of a 6½-year-old." 492 U.S. at 308.

The child abuse evidence was horrifying. Penry's mother was a deeply disturbed woman who, believing her son to be an illegitimate child, conceived a bitter hatred for him and tortured him physically and psychologically almost from birth. Scars from her physical beatings and scaldings with hot water remained visible at the time of trial. When Penry was a small child, his mother threatened to castrate him with scissors, locked him in a room for days without access to toilet facilities and humiliated him by making him eat his own excrement. (JA 146-51, 173-78) She habitually addressed him with the name "little bastard" and other epithets of abuse. (JA 146, 178, 222)

At the sentencing phase of Penry's second trial, as at his first, the essence of his case was that his mental retardation and child abuse, while not excusing his crime, mitigated his guilt sufficiently to make the difference between a death sentence and life sentence.

2. The Three "Special Issues"

In *Penry I*, in setting aside Penry's death sentence after his first trial, this Court stated:

> Although Penry offered mitigating evidence of his mental retardation and abused childhood as the basis for a sentence of life imprisonment rather than death, the jury that sentenced him was only able to express its views on the appropriate sentence by answering three questions.

492 U.S. at 320.

The questions were those then prescribed by Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon 1981) (A-7-A-9[2]):

> i) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with reasonable expectation that the death of the deceased or another would result;
>
> ii) whether there is a reasonable probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> iii) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

The *Penry I* Court held that those questions were constitutionally flawed as applied to Penry (at least in the

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[2] References to "A" are to the attached Appendix.

absence of an appropriate definition of the word "deliberately"), because they could leave a reasonable juror no vehicle to give effect to the view that the mitigating evidence justified a sentence less than death. 492 U.S. at 322; *see* pp. 12-15 below. But, incredibly, the trial court in Penry's second trial submitted the exact same three questions to the jury and no others, and ignored this Court's statement that a definition of "deliberately" was necessary. The trial court rejected the definition of "deliberately" requested by Penry (JA 669-71), and sought instead to comply with *Penry I* by instructing the jury as follows:

> If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, *give effect and consideration to them* in assessing the defendant's personal culpability *at the time you answer the special issue*. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, *as reflected by a negative finding to the issue under consideration*, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the three special questions.

(JA 675; emphasis added). The trial court never explained how the jury was supposed to "give effect and consideration" to mitigating circumstances in answering questions to which these circumstances were essentially irrelevant.

The jury retired to deliberate with a verdict form identical to the one used in *Penry I* and returned with an identical verdict of three affirmative answers. (JA 676-78) The trial court then again sentenced Penry to death.

As a result of *Penry I*, the Texas statutory scheme has been changed. A capital jury must now answer an additional "special issue" that expressly addresses mitigating evidence. At Penry's second trial, however, the new statute was not yet in effect. *See* Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon Supp. 2001). (A-2-A-7) Thus, while all Texas capital defendants now have the benefit of a "Penry" question, Penry himself was deprived of such a question at his own retrial.

B. Facts Relating to the *Estelle* v. *Smith* Issue

In 1977, Penry was arrested on a charge unrelated to the crime involved in the present case. On Penry's counsel's motion, the court in that case appointed a psychiatrist, Dr. Felix Peebles, to examine Penry, in order to determine if he was competent to stand trial. Penry was examined by Dr. Peebles on May 19, 1977, without being warned that statements made during the examination could be used against him at a sentencing proceeding. (JA 55-60)

Dr. Peebles concluded that, although Penry suffered from moderate mental retardation and "adjustment reaction of adult life," he was "presently competent to stand trial and assist his counsel in the preparation of his defense." *Id.* The report included the additional, unrelated statement: "It is my further professional opinion that if Johnnie [sic] Paul Penry were released from custody that he would be dangerous to other persons." *Id.*

Thirteen years later, this sentence from the Peebles report became a key piece of the prosecution's case during the sentencing phase of Penry's second trial. The

report was admitted into evidence, over defense objection on Fifth Amendment grounds. (JA 346-47) The prosecution quoted Dr. Peebles' prediction of future dangerousness during its cross-examination of a defense witness. (JA 412-13) In addition, all three of the psychiatric experts called by the State relied on the Peebles report. One of the three had never examined Penry, and relied solely upon records he had reviewed. (JA 540-46, 551-55) A second had done a competency examination prior to Penry's capital trial, but was asked to express his opinion on future dangerousness without regard to that examination; thus, his testimony too was based solely on the records he had reviewed. (JA 486-87) A third expert had examined Penry briefly but, as the district court in this case found, his "diagnosis drew primarily from sources other than his examination." (JA 922) All three doctors had reviewed the Peebles report, which stood out from all the other records in that it contained a specific finding, by a psychiatrist who had examined Penry, that he would be dangerous. (JA 60)

The critical importance of the Peebles report to the state's case on future dangerousness appears from the final words of the prosecution's closing argument:

> [Penry] was examined by Dr. Felix Pebbles [sic] who found that he was sane. He knew the difference between right and wrong, and he was competent to stand trial, but *Dr. Pebbles [sic] went on and made an additional finding that was really out of the ordinary, and I have never seen this in any kind of a report, he just added it, he said that it is my further professional opinion, that if Johnny Paul Penry were released from custody, that he would be dangerous to other persons.*

(JA 668; emphasis added). Thus, the Peebles' report's "additional finding" was made the climax of the prosecution's argument that Penry should die.

C. Prior Proceedings and Proceedings Below

Penry was sentenced to death for the second time on July 17, 1990. On direct appeal, the Texas Court of Criminal Appeals affirmed. *Penry* v. *State*, 903 S.W.2d 715 (Tex. Crim. App. 1995). This Court denied certiorari, *Penry* v. *Texas*, 516 U.S. 977 (1995), and subsequently denied a motion for rehearing. 516 U.S. 1069 (1996). Penry then sought state habeas corpus relief, which was denied by the trial court on September 23, 1997. (JA 795-862). The denial was affirmed by the Texas Court of Criminal Appeals on December 3, 1997. (JA 863-64)

The present federal habeas corpus proceeding was begun in the United States District Court for the Southern District of Texas, which denied relief in an opinion dated March 29, 1999. (JA 865-1017) The District Court also denied a Certificate of Appealability ("COA"). (JA 1016) On April 9, 1999, Penry filed a Motion to Alter and Amend the judgment which was denied on August 13, 1999. (JA 1018-36) Penry moved for a COA in the United States Court of Appeals for the Fifth Circuit. After granting a stay and hearing oral argument, that court denied a COA on June 20, 2000, 215 F.3d 504 (JA 1037-60), and denied Penry's motion for rehearing on July 25, 2000. (JA 1061-62) This Court granted certiorari to review the Court of Appeals' decision.

SUMMARY OF THE ARGUMENT

I. The Procedure Followed at Penry's Second Trial Repeated the Error Condemned in *Penry I*

This Court held in *Penry I* that, for reasons the Court explained in detail, the three "special issues" submitted to the jury pursuant to the Texas statutory scheme were not adequate to permit the jury to give effect to the evidence of mental retardation and child abuse, at least in the absence of a definition of the word "deliberately" in the first special issue. Ignoring this ruling, the Texas court at Penry's second trial again submitted the same three special issues to the jury, and again did not define "deliberately."

The trial court attempted to cure the *Penry I* error with an instruction which told the jury to "give effect and consideration" to mitigating circumstances "at the time you answer the special issue," and said that a life sentence must be "reflected by a negative finding to the issue under consideration." This instruction was essentially meaningless, because, as this Court had already held, the mitigating circumstances were not within the scope of the special issues.

The instruction given by the trial court was not a "nullification" instruction: it did not unambiguously tell the jury to give a false answer to one of the special issues if it wished to give effect to the mitigating circumstances. Moreover, such a nullification instruction would be unconstitutional, for it would be an instruction to the jurors to violate their oaths.

II. The Admission of the Peebles Report Violated Penry's Fifth Amendment Rights under *Estelle* v. *Smith*

This case involves the same material facts that led this Court to hold in *Estelle* v. *Smith*, 451 U.S. 454 (1981), that the Fifth Amendment was violated: Penry underwent an examination for competency purposes; he was not warned at the time of that examination that his statements could be used against him at a subsequent sentencing proceeding; but nevertheless, the result of the examination was introduced in evidence at the sentencing proceeding to prove Penry's future dangerousness. Thus there was a clear *Estelle* v. *Smith* violation.

The Court of Appeals deferred to the view of the Texas Court of Criminal Appeals distinguishing *Estelle* v. *Smith* on the ground that, in Penry's case, the competency examination was requested by Penry's counsel. This distinction is untenable. It is clear from the face of *Estelle* v. *Smith* that the psychiatrist becomes an "agent of the state" when he exceeds the original purpose of a competency examination. Thus, whether the appointment of the psychiatrist by the Court to conduct a competency examination originated from defense counsel's motion or not is irrelevant, as all decisions prior to this case have held. Moreover, no court has held, and there is no basis for arguing, that Penry's motion for the appointment of a psychiatrist constituted a waiver of his *Estelle* v. *Smith* Fifth Amendment rights.

ARGUMENT

Penry is seeking federal habeas corpus relief. Such relief may be granted, under the Antiterrorism and Effective Death Penalty Act ("AEDPA") 28 U.S.C.A. § 2254 (1994 & Supp. 2000), if the decision of the Texas Court of Criminal Appeals affirming Penry's conviction and death sentence "was either (1) 'contrary to . . . clearly established Federal Law, as determined by the Supreme Court of the United States,' or (2) 'involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States.' " *Williams* v. *Taylor*, 529 U.S. 362, 120 S. Ct. 1495, 1519 (2000) (quoting 28 U.S.C.A. § 2254(d)(1)).

The "contrary to" and the "unreasonable application" clauses of the AEDPA are independent. In *Williams*, Justice O'Connor explained that "contrary to" means that "the state court's decision must be substantially different from the relevant precedent of this Court." *Williams*, 120 S. Ct. at 1519. "A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases." *Id.* A "state-court decision will also be contrary to this Court's clearly established precedent if the state court confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent." *Id.* at 1519-20. Under the second prong of the statute, a "state-court decision that correctly identifies the governing legal rule but applies it unreasonably to the facts of a particular prisoner's case certainly would qualify as a decision 'involv[ing] an unreasonable application' of . . . clearly established Federal law." *Id.* at 1522.

The AEDPA test is met here. The Texas court's decision was contrary to *Penry I* and *Estelle* v. *Smith*, because the facts here are "materially indistinguishable" from those cases, and yet the Texas court arrived at the opposite result. In the alternative, the Texas decision involved, at best, an "unreasonable application" of *Penry I* and *Estelle* v. *Smith* to the facts of this case. The Court of Appeals therefore erred in deferring to the decision of the Texas Court of Criminal Appeals.

I.

THE PROCEDURE FOLLOWED AT PENRY'S SECOND TRIAL REPEATED THE ERROR CONDEMNED IN *PENRY I*

A. *Penry I* Held That the Special Issues Were Constitutionally Flawed as Applied to Penry

Penry I rested on the fundamental principle, repeatedly reaffirmed by this Court, that, in a capital case, "the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence." *Weeks* v. *Angelone*, 528 U.S. 225, 120 S. Ct. 727, 732 (2000); *see also Hitchcock* v. *Dugger*, 481 U.S. 393, 394 (1987); *Skipper* v. *South Carolina*, 476 U.S. 1, 4 (1986); *Eddings* v. *Oklahoma*, 455 U.S. 104, 114 (1982); *Lockett* v. *Ohio*, 438 U.S. 586, 604 (1978). While the "State may structure the jury's consideration of mitigation" it may "not preclude the jury from giving effect to it." *Weeks*, 120 S. Ct. at 732. *See also Johnson* v. *Texas*, 509 U.S. 350, 362 (1993). If there is "a reasonable likelihood that the jury has applied the challenged instruction in a way

that prevents the consideration of constitutionally relevant evidence," the instruction cannot withstand scrutiny. *Boyde* v. *California*, 494 U.S. 370, 380 (1990).

This Court held in *Penry I* that instructions that precluded the consideration of mitigating evidence except within the confines of the three "special issues" then in effect under Texas' capital sentencing statute (quoted at page 4 above) violated those principles as applied to Penry's case, because they were reasonably likely to prevent the jury from considering his particular mitigating evidence at all. The heart of the Court's ruling was its careful analysis of each of the special issues.

As to the first issue – whether the defendant's conduct was committed "deliberately and with the reasonable expectation that the death of the deceased or another would result" – the Court held that it did not adequately permit consideration of Penry's mental retardation and child abuse, unless "deliberately" were defined in a way that clearly directed such consideration. The Court said:

> Neither the Texas Legislature nor the Texas Court of Criminal Appeals have defined the term "deliberately," and the jury was not instructed on the term, so we do not know precisely what meaning the jury gave to it. Assuming, however, that the jurors in this case understood "deliberately" to mean something more than that Penry was guilty of "intentionally" committing murder, those jurors may still have been unable to give effect to Penry's mitigating evidence in answering the first special issue.
>
> Penry's mental retardation was relevant to the question whether he was capable of acting

> "deliberately," but it also "had relevance to [his] moral culpability beyond the scope of the special verdict questio[n]." Personal culpability is not solely a function of a defendant's capacity to act "deliberately". . . .
>
> In the absence of jury instructions defining "deliberately" in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability, we cannot be sure that the jury was able to give effect to the mitigating evidence of Penry's mental retardation and history of abuse in answering the first special issue. . . .

492 U.S. at 322-23 (quoting *Franklin* v. *Lynaugh*, 487 U.S. 164, 185 (1988)) (citation omitted).

The second special issue asked "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Id.* There was no way, the Court pointed out, to consider Penry's mental retardation and child abuse as *mitigating* factors in addressing this question. The Court said:

> The mitigating evidence concerning Penry's mental retardation indicated that one effect of his retardation is his inability to learn from his mistakes. Although this evidence is relevant to the second issue, it is relevant only as an *aggravating* factor because it suggests a "yes" answer to the question of future dangerousness. . . .
>
> The second special issue, therefore, did not provide a vehicle for the jury to give mitigating

> effect to Penry's evidence of mental retardation and childhood abuse.

492 U.S. at 323-24.

The third special issue asked "whether the conduct of the defendant . . . was unreasonable in response to the provocation, if any, by the deceased." *Id.* This question too, the Court explained, did not adequately permit jury consideration of Penry's mitigating evidence:

> Even if a juror concluded that Penry's mental retardation and arrested emotional development rendered him less culpable for his crime than a normal adult, that would not necessarily diminish the "unreasonableness" of his conduct in response to "the provocation, if any, by the deceased." Thus, a juror who believed Penry lacked the moral culpability to be sentenced to death could not express that view in answering the third special issue if she also concluded that Penry's action was not a reasonable response to provocation.

492 U.S. at 324-25.

Because of the constitutional flaws in the three special issues, the *Penry I* Court held that Penry's first death sentence could not stand.

B. The Texas Trial Court Failed To Cure the *Penry I* Error

At Penry's retrial, the trial court paid no attention to the *Penry I* Court's above-quoted analysis. It gave the jury the same three questions, despite this Court's demonstration of their inadequacy. (JA 672-78) It rejected Penry's

request for a definition of "deliberately" and left the term undefined, despite this Court's statement that "[i]n the absence of jury instructions defining 'deliberately' " the first question was unduly limiting. 492 U.S. at 323. The trial court's only attempt to remedy the constitutional flaw that led to the reversal in *Penry I* was an instruction, quoted in full at page 5 above, which told the jurors to "give effect and consideration to [mitigating circumstances] at the time you answer the special issue" and to make a negative finding to "one of the three special questions" if they found a life sentence "as reflected by a negative finding to the issue under consideration" to be an appropriate response to the defendant's culpability.

This instruction simply did not cure the *Penry I* error. It did not liberate the jury from the confining effect of the three "special issues," which, as this Court's analysis in *Penry I* demonstrates, deprived Penry of his constitutional rights. On the contrary, the instruction given at Penry's second trial repeatedly drew the jury back to those same three special issues. The charge told the jury that the mitigation testimony should be considered "at the time [they] answer[ed] the special issue." Then the instruction told jurors that in order to determine whether "a life sentence" was "an appropriate response to the personal culpability of the defendant," the life sentence had to be "reflected by a negative finding" to one of the three questions.

For the reasons stated in the above-quoted language from *Penry I*, it was impossible to comply with this instruction. The mitigating circumstances – mental retardation and child abuse – just did not fit, at least not in a

mitigating way, within the scope of the special issues. Therefore, no juror could "give effect and consideration" to those factors at the time he or she answered the special issue, and a life sentence based on mitigating circumstances could not be "reflected by a negative finding" to a special issue. The Texas Court of Criminal Appeals recognized this problem in another case involving a mentally retarded defendant, stating:

> Without more explanation, an instruction that baldly tells the jury it may consider evidence to be mitigating that seems either altogether irrelevant to the special issues, or relevant only in an aggravating sense, is likely in the context of [the Texas] scheme to confound rather than inform.

Rios v. *State*, 846 S.W.2d 310, 317 (Tex. Crim. App. 1992) (*en banc*). Because the instruction "confound[ed]" the jury "rather than inform[ing]" them as to how to give effect to the defendant's evidence of mental retardation, the Texas Court held that there was "a reasonable likelihood that the jury ha[d] applied the challenged instruction in a way that prevent[ed] the consideration of constitutionally relevant evidence." *Id.* (quoting *Boyde*, 494 U.S. at 380).

The insufficiency of the instruction given by the Texas trial court here can be illustrated by contrast to instructions this Court has upheld as consistent with *Penry I*. In *Buchanan* v. *Angelone*, 522 U.S. 269 (1998), the approved instruction told the jurors in plain language: "if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment." *Buchanan*, 522 U.S. at 272-73; *see also id.* at 272 n.1. This Court approved this

instruction because it "did not foreclose the jury's consideration of any mitigating evidence. By directing the jury to base its decision on 'all the evidence,' the instruction afforded jurors an opportunity to consider mitigating evidence." *Id.* at 277. This Court stated that "in *contrast to the Texas special issues scheme in question in Penry*, . . . the instructions here did not constrain the manner in which the jury was able to give effect to mitigation." *Id.* (emphasis added).

In *Weeks* v. *Angelone*, *supra*, this Court again addressed the sentencing scheme at issue in *Buchanan*. In addition to the instructions in *Buchanan*, the *Weeks* jury was told: "You must consider a mitigating circumstance if you find there is evidence to support it." *Weeks*, 120 S. Ct. at 732 & n.2. This Court relied upon the fact that the *Weeks* jury "received an explicit direction to consider mitigating evidence" in affirming the death sentence. *Id.* at 732. But here, rather than receiving "an explicit direction to consider mitigating evidence," Penry's jury received an "explicit direction" that confined their consideration of mitigating evidence within the framework of the three special issues on which they were to return a yes-or-no verdict.

The Texas courts violated Penry's constitutional rights by ignoring the holding and reasoning of *Penry I*. Here, as in *Penry I*, there was no "vehicle," under the court's charge, for the jury to "express[ ] its 'reasoned moral response' " to the mitigating evidence. *See Penry I*, 492 U.S. at 328 (construing *Lockett* v. *Ohio*, 438 U.S. 586 (1978), and *Eddings* v. *Oklahoma*, 455 U.S. 104 (1982)).

C. The *Penry I* Error Cannot Be Overcome By Reading The Trial Court's Instruction as a "Nullification Instruction"

The Texas Court of Criminal Appeals called the instruction at issue here a "nullification instruction." 903 S.W.2d at 765.[3] It implied by this that Penry's jury was able, under the dictates of *Penry I*, to "give effect" to Penry's mitigating evidence – by rendering a false verdict. The Court of Appeals found the Texas Court's interpretation "not an unreasonable application of clearly established law, namely *Penry I*," because the jurors could "give effect to any mitigating circumstances supported by the evidence by answering 'no' to one of the special issues if they felt a life sentence was appropriate." 215 F.3d at 509. (JA 1043)

There are two reasons why this "nullification" reading of the instruction does not save it from constitutional infirmity: The instruction does not tell the jury to "nullify" the special issues, and it would be unconstitutional if it did.

1. The Charge is Not a Nullification Instruction

It would have been very easy for the trial court, had it chosen to do so, to say to the jury in plain English: "If you think the defendant does not deserve to die, answer 'no' to one of the questions, even if the correct answer is

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[3] Cf. *Rios* v. *State*, 846 S.W.2d 310, 316 (Tex. Crim. App. 1992) (*en banc*), where the court called a similar instruction a "clumsy attempt at jury nullification."

'yes.' " But the trial court gave no such instruction, preferring to tell jurors to do the impossible: "give effect and consideration" to irrelevant mitigating facts "at the time you answer the special issue." The jurors should not have been expected to read into this language the extraordinary instruction which the trial court refrained from giving – "give a false answer if you want to." Any doubt as to the clarity of the instructions should be resolved "[i]n death cases . . . in favor of the accused." *Mills* v. *Maryland*, 486 U.S. 367, 377 (1988) (quoting *Andres* v. *United States*, 333 U.S. 740, 752 (1948)).

It is true that Penry's counsel, in his closing argument at the second trial, asked the jury to take the "nullification" approach (JA 639); defense counsel had little choice, for no other approach was at all likely to save Penry's life. But, assuming it would have been proper for a court to condone jury nullification, the jurors should at least hear unambiguous instructions to nullify from the judge, not from a partisan advocate. Indeed, as noted in *Penry I*, defense counsel had made a similar nullification argument at Penry's *first* trial. 492 U.S. at 325 ("defense counsel [] argue[d] that if a juror believed that Penry, because of the mitigating evidence of his mental retardation and abused background, did not deserve to be put to death, the juror should vote 'no' on one of the special issues even if she believed the State had proved that the answer should be 'yes.' "). That did not prevent the *Penry I* court from holding Penry's first death sentence unconstitutional. *Penry I* thus confirms what many other cases also demonstrate – that where a judge's charge does not state the law correctly, a correct statement in counsel's

argument cannot cure the error. As this Court has explained:

> [A]rguments of counsel generally carry less weight with a jury than do instructions from the court. The former are usually billed in advance to the jury as matters of argument, not evidence, . . . and are likely viewed as the statements of advocates; the latter, we have often recognized, are viewed as definitive and binding statements of the law.

Boyde, 494 U.S. at 384 (1990); *see also Simmons* v. *South Carolina*, 512 U.S. 154, 173 (1994) (Souter, J., with Stevens, J., concurring) ("While . . . counsel ought to be permitted to inform the jury of the law that it must apply, [we] also accept the general rule that, on matters of law, arguments of counsel do not effectively substitute for statements by the court"). Therefore, "[a] jury is presumed to follow its instructions." *Weeks*, 120 S. Ct. at 732 (citing *Richardson* v. *Marsh*, 481 U.S. 200, 211 (1987)).

2. A Nullification Instruction Would Have Been Unconstitutional

Even if the trial court had given a clear nullification instruction, or if the instruction it did give could be interpreted as the Texas Court of Criminal Appeals interpreted it, that would not make Penry's death sentence constitutional – for the simple reason that instructing jurors to give false verdicts is intolerable. Every juror in Texas is required to swear the following oath:

> You and each of you do solemnly swear that in the case of the State of Texas against the defendant, you will a *true* verdict render according to the law and the evidence, so help you God.

Tex. Code Crim. Proc. Ann. art. 35.22 (Vernon 1989) (A-2; emphasis added). A jury must be able to spare a capital defendant's life without betraying its obligation to render a "true verdict."

In *Roberts* v. *Louisiana*, 428 U.S. 325, 335 (1976), this Court held that an instruction of the "nullification" type was a constitutionally inadequate means for a capital jury to give effect to mitigating evidence. In *Roberts*, the jury was instructed to consider crimes other than first degree murder "even if there [was] not a scintilla of evidence to support the lesser verdicts." *Roberts*, 428 U.S. at 334. Similarly, Penry's jury was instructed to answer "no" to one of the special issues even if there was "not a scintilla of evidence" to support such an answer. As this Court held in *Roberts*:

> This responsive verdict procedure not only lacks standards to guide the jury in selecting among first-degree murderers, but it *plainly invites the jurors to disregard their oaths* and choose a verdict for a lesser offense whenever they feel the death penalty is inappropriate. There is an *element of capriciousness* in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to disregard the [law].

428 U.S. at 334-35. "The Eighth Amendment . . . simply cannot tolerate the reintroduction of a practice so thoroughly discredited." *Id.* at 336; *see also Beck* v. *Alabama*, 447 U.S. 625, 644 (1980) (jurors "should not be expected to

make such lawless choices"); *May* v. *Collins*, 904 F.2d 228, 233-34 (5th Cir. 1990) (Reavley, J. with King, J., concurring) (a juror "may not (and should not) feel at liberty to express her ultimate conclusion, since it requires nullification of one of the statutory questions.")

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For the above reasons, Penry's death sentence is unconstitutional under *Penry I*. As the dissenting judge in the Court of Appeals put it:

> The sentencing scheme and instructions adopted by Texas in Penry's second trial . . . do not satisfy the constitutional requirements described in *Penry I*. The jury was not clearly and directly instructed that it could consider and give effect to the mitigating evidence of Penry's mental retardation, organic brain damage and abused background as a whole and beyond the scope of the special issues by declining to impose the death penalty. Texas did not replace its sentencing scheme with one which puts "before the jury all sympathetic factors bearing upon the defendant's background and character, and the circumstances of the offense, so that the jury may decide without further guidance whether he 'lacked the moral culpability to be sentenced to death.' "

215 F.3d at 514 (JA 1055-56) (Dennis, J., dissenting) (quoting *Penry I*, 492 U.S. at 359 (Scalia, J., concurring in part and dissenting in part)). Because the jury's ability to give effect to the substantial mitigating evidence presented was "still shackled and confined within the scope of the three special issues," Penry's jury was deprived of "the

ability to give full and complete effect to Penry's mitigating evidence of mental retardation, brain damage and child abuse." 215 F.3d at 514 (JA 1057) (Dennis, J., dissenting).

Penry, a mentally retarded man who endured the most horrific child abuse imaginable, "has been caught in a web spun of words and logic that, in the end, has deprived [him] of his constitutional rights, a deprivation that may cost him his life." *May* v. *Collins*, 904 F.2d 228, 234 (5th Cir. 1990) (Reavley, J. with King, J., concurring). The decision of the Court of Appeals should be reversed.

II.

THE ADMISSION OF THE PEEBLES REPORT VIOLATED PENRY'S FIFTH AMENDMENT RIGHTS UNDER *ESTELLE* V. *SMITH*

As the Statement of the Case (at pages 6-8 above) shows, Penry was examined by a court-appointed psychiatrist, Dr. Felix Peebles, for the purpose of determining his competence to stand trial. He was not warned that the statements he made in the examination might later be used to prove his future dangerousness. Nevertheless, the result of the psychiatric examination was used at a capital trial for just that purpose. In these respects, the present case is identical with *Estelle* v. *Smith*, 451 U.S. 454 (1981), which held that Texas's use of the defendant's statements for such a purpose violates the Fifth Amendment.

The Court of Appeals deferred to the holding of the Texas Court of Criminal Appeals that *Estelle* v. *Smith* was distinguishable because Penry's counsel requested a competency examination. This conclusion – contrary to prior

decisions of the Fifth Circuit, the Eleventh Circuit, and every other court, so far as we are aware, that has addressed the issue – is based on a misreading of the clear language of *Estelle* v. *Smith*.

A. *Estelle* v. *Smith* is Directly in Point

Estelle v. *Smith* decided that where a psychiatrist examined a defendant to determine his competence to stand trial and then testified at the penalty phase of the defendant's trial, the "testimony at the penalty phase violated [the defendant's] Fifth Amendment privilege against compelled self-incrimination because [the defendant] was not advised before the pretrial psychiatric examination that he had a right to remain silent and that any statement he made could be used against him at a sentencing proceeding." 451 U.S. at 461.

In *Estelle* v. *Smith*, prior to the capital trial of Ernest Benjamin Smith, a Texas judge "informally ordered the State's attorney to arrange a psychiatric examination of Smith by Dr. James P. Grigson to determine Smith's competency to stand trial." 451 U.S. at 456-57. Dr. Grigson interviewed Smith and concluded that he was competent to stand trial. *Id.* at 457. Later, at the sentencing phase of Smith's trial, at which the defendant's future dangerousness was in issue under the Texas statutory scheme, the State called Dr. Grigson as a witness. Dr. Grigson expressed the opinion, based on his examination of Smith, that Smith would indeed be dangerous; he testified, among other things, that Smith "is going to go ahead and commit other similar or same criminal acts if given

the opportunity to do so." *Id.* at 460 (internal quotation and citation omitted).

Estelle v. *Smith* held that "the State's attempt to establish respondent's future dangerousness by relying on the unwarned statements he made to Dr. Grigson [ ] infringes [the] Fifth Amendment." *Id.* at 463. The Court held that when Dr. Grigson's evaluation went beyond the "limited, neutral purpose of determining his competency to stand trial" and was used for "a much broader objective that was plainly adverse to respondent," the Fifth Amendment was implicated. *Id.* at 465. The defendant's Fifth Amendment rights were violated when "the State offered information obtained from the court-ordered competency examination as affirmative evidence to persuade the jury to return a sentence of death." *Id.* at 466.

The Court explained that the rule of *Miranda* v. *Arizona*, 384 U.S. 436, 467 (1966), came into play when the State sought to use against Smith the statements he made in his interview with Dr. Grigson:

> That respondent was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney, is immaterial. *When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State* recounting unwarned statements made in a postarrest custodial setting. During the psychiatric evaluation, respondent assuredly was "faced with a phase of the adversary system"

> and was "not in the presence of [a] perso[n] acting solely in his interest." Yet he was given no indication that the compulsory examination would be used to gather evidence necessary to decide whether, if convicted, he should be sentenced to death. He was not informed that, accordingly, he had a constitutional right not to answer the questions put to him.

Estelle v. *Smith*, 451 U.S. at 467 (quoting *Miranda*, 384 U.S. at 469) (emphasis added). Under *Miranda*, "when faced while in custody with a court-ordered psychiatric inquiry, respondent's statements to Dr. Grigson were not 'given freely and voluntarily without any compelling influences' and, as such, could be used as the State did at the penalty phase only if respondent had been apprised of his rights and had knowingly decided to waive them." *Id.* at 469 (quoting *Miranda*, 384 U.S. at 478).

The *Estelle* v. *Smith* Court made clear that it found a constitutional flaw not in the fact that a competency examination was ordered, but in the failure to put limits on the examination's use. The Court stated that, had the defendant been adequately warned and refused to waive his Fifth Amendment privilege, the competency examination could have "proceeded upon the condition that the results would be applied solely for that purpose." *Id.* at 468. However, where a competency examination is limited only to determining the defendant's competence to stand trial "the State must make its case on future dangerousness in some other way." *Id.* at 469.

The role of the Peebles report at Penry's second trial was the same as that of Dr. Grigson's testimony at the trial of the defendant in *Estelle* v. *Smith*. Dr. Peebles, like

Dr. Grigson, undertook what should have been a "limited, neutral" examination to determine if Penry was competent to stand trial. *Id.* at 465. His examination strayed beyond that "limited, neutral" purpose and he drew a conclusion as to Penry's future dangerousness that allowed the State to use the examination "for a much broader objective that was plainly adverse" to Penry. *Id.* Because Penry was not told that anything he said to Dr. Peebles could be used against him at sentencing, whatever evidence of dangerousness Dr. Peebles may have obtained through his examination of Penry violated the Fifth Amendment privilege. *See id.* at 469. Because the State failed to "make its case on future dangerousness in some other way," *id.*, and instead condemned Penry to death " 'by the simple, cruel expedient of forcing [evidence against him] from his own lips,' " *id.* at 462 (quoting *Colombe* v. *Connecticut*, 367 U.S. 568, 581-82 (1961)), Penry's death sentence violates the Fifth Amendment and cannot stand. *Id.* at 469.

B. *Estelle* v. *Smith* Cannot be Distinguished on the Ground That Penry's Counsel Requested the Competency Examination

1. The Request of Defense Counsel Did Not Prevent Dr. Peebles from Becoming an "Agent of the State"

The Court of Appeals in this case recited the finding of the Texas Court of Criminal Appeals that there was "no Fifth Amendment violation because Penry's attorney had requested the examination; thus, Dr. Peebles was acting as an agent of the defense and not of the State in conducting his examination." 215 F.3d at 511 (JA 1048-49;

see 903 S.W.2d at 759.) The Court of Appeals found that this conclusion was not "unreasonable or contrary to Supreme Court precedent." 215 F.3d at 511. (JA 1049) In so holding, however, the Court of Appeals overlooked the express rationale of *Estelle* v. *Smith*. The *Estelle* v. *Smith* Court found Dr. Grigson's status as an agent of the State to depend not on who requested the examination, but on the prosecutor's use of Dr. Grigson's testimony in a manner that exceeded the original scope of the examination: "When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, *his role changed* and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting." *Estelle*, 451 U.S. at 467 (emphasis added).

Thus it is clear from the face of *Estelle* v. *Smith* that the original moving factor in the psychiatrist's appointment is not what makes him an "agent of the State" or otherwise. His "role change[s]" to that of an "agent of the State" when his examination exceeds its original purpose. No court in any case except the present one has, so far as we are aware, held that a psychiatrist who is appointed at defense counsel's request is incapable of becoming an agent of the State for *Estelle* v. *Smith* purposes. Indeed, the Fifth Circuit itself, and other appellate and district courts, had previously held to the contrary.

In *Battie* v. *Estelle*, 655 F.2d 692 (5th Cir. 1981), the Fifth Circuit held that where a psychiatrist "had been appointed by the state trial court to conduct the examination . . . the custodial interrogation was conducted *by an*

agent of the state." Id. at 699-700 (emphasis added). The *Battie* court held further that

> the fact that the defense requested the examination does not obviate the necessity for giving the *Miranda* warnings where the defense did not request such an examination on the question of future dangerousness. . . . The fact that defense counsel initially requested an examination to determine the petitioner's competency and sanity does not render *Miranda* inapplicable.

655 F.2d at 702-03.[4]

The Court of Appeals for the Eleventh Circuit has followed *Battie* on this issue. *See Hargrave* v. *Wainright*, 804 F.2d 1182, 1191 (11th Cir. 1986) (following *Battie* and stating that it is "irrelevant that it was petitioner who requested the competency examination conducted by Dr. Sylvester"), *rev'd on other grounds sub nom. Hargrave* v. *Dugger*, 832 F.2d 1528 (11th Cir. 1987). *See also Pierre* v. *Shulsen*, 802 F.2d 1282, 1283 (10th Cir. 1986) (discussing *Estelle* in context of competence examination conducted "at the request of [defendant's] trial counsel"; claim was held to be procedurally barred). District Court precedent is to the same effect. *See Tuggle* v. *Thompson*, 854 F. Supp. 1229, 1233, 1242, 1243 (W.D. Va. 1994) ("Petitioner's trial counsel . . . filed a motion for the appointment of a

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[4] In denying Penry's petition for rehearing based on *Battie*, the Court of Appeals suggested that *Battie* was no longer controlling in light of *Schneider* v. *Lynaugh*, 835 F.2d 570 (5th Cir. 1988). (JA 1061-62) *Schneider*, however, was an application of the "rebuttal" exception to *Estelle* v. *Smith* upheld in *Buchanan* v. *Kentucky*, 483 U.S. 402 (1987). As demonstrated below (pp. 40-42), *Buchanan* has no application here.

mental health professional to examine petitioner's sanity at the time of the offense and his competence to stand trial. The court granted this motion and ordered state mental health professionals to examine petitioner with respect to these two issues. . . . [T]he prosecutor called [the doctor] and he was permitted to testify at trial that there was a high probability that Tuggle would commit criminal acts of violence in the future. In his closing sentencing argument, the Commonwealth's Attorney relied heavily on [the doctor's] testimony. . . . Just as in *Estelle* v. *Smith*, [defense counsel] had no knowledge of the state's intent to trap their client on the 'future dangerousness' issue. . . . Consequently, the petitioner's petition for writ of habeas corpus will be granted on this basis."), *rev'd on other grounds*, 57 F.3d 1356 (4th Cir.), *vacated and remanded on other grounds*, 516 U.S. 10 (1995).

The opinion of Justice Stevens in *Smith* v. *Murray*, 477 U.S. 527 (1986), also demonstrates the error of the Court of Appeals here. In *Murray*, the petitioner had been examined by a psychiatrist appointed by the court at the request of his counsel. *See* 477 U.S. at 529. The psychiatrist testified against the petitioner at the sentencing phase of his capital trial. *See id.* at 530. While the majority held that the *Estelle* v. *Smith* claim was procedurally barred, Justice Stevens, dissenting on the procedural bar issue, stated that "Chief Justice Burger's opinion for the Court in *Estelle* v. *Smith* . . . makes it absolutely clear that the introduction of this evidence by the prosecution at the sentencing stage violated the Fifth Amendment." 477 U.S. at 551 (Stevens, J., dissenting). Justice Stevens went on to reject the argument that the defense request for examination distinguished the case from *Estelle* v. *Smith*:

> The State argues that petitioner's case is distinguishable from *Estelle* because the defense requested the psychiatric examination. In view of the fact that Dr. Pile related the account to the prosecution and the court, and testified for the prosecution, he was quite clearly an "agent of the State" in the same sense in which the psychiatrist in *Estelle* was an agent of the State.

Id. at 553 n.23.

Nothing in the majority opinion in *Smith* v. *Murray* suggests any disagreement with the above statements by Justice Stevens. Indeed, until this case, it appears that every judge to consider the issue has concluded, in accordance with the clear language of *Estelle* v. *Smith*, that a psychiatrist appointed on motion of defense counsel may become an agent of the State for *Estelle* v. *Smith* purposes.

2. The Request of Defense Counsel Did Not Waive Penry's Fifth Amendment Rights

a. Penry Could Not Reasonably Have Anticipated the State's Use of His Statements

It cannot be concluded – and, indeed, neither the Court of Appeals opinion nor any prior opinion in this case suggests – that Penry waived his Fifth Amendment rights by making a motion for a court-ordered competency examination. A waiver argument here would be simply illogical; Penry could not reasonably have expected, when he moved for a competency examination in 1977, that his statements could be used to prove future dangerousness in a subsequent sentencing proceeding. He therefore could not have waived his right to object to the use of his statements at a sentencing proceeding –

either in connection with the crime for which he was in custody at the time of the Peebles examination or any subsequent crime. His Fifth Amendment rights were violated because he "was not advised before the pretrial psychiatric examination that he had a right to remain silent and that any statement he made could be used against him at a sentencing proceeding." *Estelle* v. *Smith*, 451 U.S. at 461.

It is well established that a defendant's waiver of his Fifth Amendment rights is no broader than the defendant may reasonably anticipate at the time he makes the waiver. This Court has held that where a defendant waives his Fifth Amendment rights, the scope of the "waiver is determined by the scope of relevant cross-examination." *Brown* v. *United States*, 356 U.S. 148, 154-55 (1958); *see also Mitchell* v. *United States*, 526 U.S. 314, 322 (1999). If a defendant testifies, by "her direct testimony she ha[s] opened herself to cross-examination on the matters relevantly raised by that testimony." *Brown*, 526 U.S. at 157. This Court recently applied *Estelle* v. *Smith* and *Brown* in holding that where a defendant waived her Fifth Amendment rights by participating in a plea colloquy, that did not permit the use of her statements against her on sentencing, because there was "no convincing reason why [such a] narrow inquiry. . . . should entail such an extensive waiver of the privilege." *Mitchell*, 526 U.S. at 322. No Justice dissented from this aspect of the *Mitchell* holding, which applied long-established principles of waiver.

b. *Buchanan* v. *Kentucky* Does Not Support a Waiver Argument

Buchanan v. *Kentucky*, 483 U.S. 402 (1987), cannot support a waiver argument here.[5] In *Buchanan*, this Court established a "rebuttal" exception to *Estelle* v. *Smith*, holding that

> if a defendant requests [a psychiatric] evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. . . . The introduction of such a report for this limited *rebuttal* purpose does not constitute a Fifth Amendment violation.

483 U.S. at 422-24 (emphasis added). In *Powell* v. *Texas*, 492 U.S. 680 (1989), this Court summarized the holding of *Buchanan* as follows:

> [I]n *Buchanan* the Court held that if a defendant requests a psychiatric examination in order to prove a mental-status defense, he waives the right to raise a Fifth Amendment challenge to the prosecution's use of evidence obtained through that examination *to rebut the defense*.

Id. at 684 (emphasis added).

Buchanan is totally irrelevant here, because Penry did not present any psychiatric or other mental-status evidence on the issue of future dangerousness, and the

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[5] Although the Court of Appeals did not adopt a waiver theory, it cited and quoted from *Buchanan*. *See* 215 F.3d at 511 n.21. (JA 1049) It did not explain why it thought *Buchanan* relevant.

Peebles report did not rebut any evidence that Penry did present.

The mental-status evidence presented by Penry at his trial – in the form both of documentary evidence and the testimony of a psychologist who had examined Penry – went to show that Penry was mentally retarded and brain-damaged. Nothing in this evidence tended to show, or was offered to show, that Penry would not be dangerous in the future. The only mental-status witness called by the defense, Dr. Randall Price, did not mention the future dangerousness issue on direct examination; on cross-examination by the State, Dr. Price was questioned on the subject over defense objection, and acknowledged that Penry, if released into the community, might indeed be dangerous. (JA 391-92)

The key statement in the Peebles report – "that if Johnnie [sic] Paul Penry were released from custody . . . he would be dangerous to other persons" – was thus not a rebuttal to any mental-status evidence offered by the defense. Nor did the remainder of the Peebles report go to rebut the defense claim that Penry was mentally impaired; on the contrary, the Peebles report confirms this. Dr. Peebles diagnosed Penry as suffering from moderate mental retardation and "adjustment reaction of adult life." (JA 59) He further noted that Penry "had difficulty learning and understanding" and that he "never learned to read and write." (JA 55) While Penry was aware of the day and month on which the examination took place, he was "unsure of the year" and "guess[ed] all the way from 1971 to 1975." (JA 59) In his conclusion as to Penry's mental status, Dr. Peebles stated:

> On retention and recall he can only repeat one number correctly in forward order and none in reverse order, whereas the average person can repeat 5 or 6 numbers correctly both in forward order and reverse order. He is unable to interpret proverbs at all and certainly is unable to do any abstract thinking. . . . His judgement [sic] and insight are quite severely impaired.

(JA 59)

In short, the Peebles report, but for its devastating statement about Penry's dangerousness, could have been a defense exhibit. Its admission into evidence cannot be justified under the *Buchanan* exception as "rebuttal," and *Buchanan* thus does not support a "waiver" theory.

c. The Nature of a Competency Examination Furnishes an Additional Reason to Reject a Waiver Theory

In the context of an examination relating to competency to stand trial, there is an additional reason why no waiver can be found: Penry could not have prevented a competency examination if he had wanted to. In moving for a competency examination, Penry's counsel was not making a strategic choice; he was fulfilling a mandatory obligation to ensure that his client was competent to stand trial. If he had not requested the examination, the Texas court would still have been required to order one, under the United States Constitution and Texas law.

In *Pate* v. *Robinson*, 383 U.S. 375, 378 (1966), this Court held that the failure of a trial court to order a competence hearing where there was a genuine doubt as to the defendant's competence "deprived [him] of his constitutional

right to a fair trial." *Pate*, 383 U.S. at 385. And Texas law provides that, if a defendant's competence is in doubt, the Court must raise the issue of the defendant's competence on its own motion if it has not been raised by counsel for the defendant or the State:

> The issue of the defendant's incompetency to stand trial shall be determined in advance of the trial on the merits if the court determines there is evidence to support a finding of incompetency to stand trial *on its own motion* or on written motion by the defendant or his counsel filed prior to the date set for trial on the merits asserting that the defendant is incompetent to stand trial.

Tex. Code Crim. Proc. Ann. art. 46.02, § 2(a) (Vernon 1979) (A-9-A-10; emphasis added). Texas law further provides that a court can *sua sponte* order a competence examination "[a]t any time the issue of the defendant's incompetency to stand trial is raised." Tex. Code Crim. Proc. Ann. art. 46.02, § 3(a) (Vernon 1979). (A-10)

* * *

In short, there would be no merit whatever to a suggestion that the motion by Penry's counsel for a competency examination in the 1977 case was a waiver of Penry's *Estelle* v. *Smith* rights. The admission of the Peebles report clearly violated those rights, and Penry's death sentence should, therefore, be set aside.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed and Penry's death sentence should be vacated.

Respectfully submitted,

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Constitutional Provisions at Issue
(relevant portions italicized)

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; *nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law*; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, *nor cruel and unusual punishments inflicted.*

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United

States; *nor shall any State deprive any person of life, liberty, or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws.

Texas Code of Criminal Procedure Article 35.22

Art. 35.22. Oath to jury

When the jury has been selected, the following oath shall be administered them by the court or under its direction: "You and each of you do solemnly swear that in the case of the State of Texas against the defendant, you will a true verdict render according to the law and the evidence, so help you God".

Current Texas Code of Criminal Procedure Article 37.071

Relevant Portion Emphasized

Art. 37.071 Procedure in capital case

Sec. 1. If a defendant is found guilty in a capital felony case in which the state does not seek the death penalty, the judge shall sentence the defendant to life imprisonment.

Sec. 2. (a) If a defendant is tried for a capital offense in which the state seeks the death penalty, on a finding that the defendant is guilty of a capital offense, the court

shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court and, except as provided by Article 44.29(c) of this code, before the trial jury as soon as practicable. In the proceeding, evidence may be presented by the state and the defendant or the defendant's counsel as to any matter that the court deems relevant to sentence, including evidence of the defendant's background or character or the circumstances of the offense that mitigates against the imposition of the death penalty. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or the defendant's counsel shall be permitted to present argument for or against sentence of death. The court, the attorney representing the state, the defendant, or the defendant's counsel may not inform a juror or a prospective juror of the effect of a failure of a jury to agree on issues submitted under Subsection (c) or (e) of this article.

(b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:

(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01 and 7.02, Penal Code, whether the defendant actually caused the death of

the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.

(c) The state must prove each issue submitted under Subsection (b) of this article beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted under Subsection (b) of this Article.

(d) The court shall charge the jury that:

(1) in deliberating on the issues submitted under Subsection (b) of this article, it shall consider all evidence admitted at the guilt or innocence stage and the punishment stage, including evidence of the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty;

(2) it may not answer any issue submitted under Subsection (b) of this article "yes" unless it agrees unanimously and it may not answer any issue "no" unless 10 or more jurors agree;

and

(3) members of the jury need not agree on what particular evidence supports a negative answer to any issue submitted under Subsection (b) of this article.

(e)(1) The court shall instruct the jury that if the jury returns an affirmative finding to each issue submitted under Subsection (b) of this article, it shall answer the following issue:

Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

(2) The court, on the written request of the attorney representing the defendant, shall:

(A) instruct the jury that if the jury answers that a circumstance or circumstances warrant that a sentence of life imprisonment rather than a death sentence be imposed, the court will sentence the defendant to imprisonment in the institutional division of the Texas Department of Criminal Justice for life; and

(B) charge the jury in writing as follows:

"Under the law applicable in this case, if the defendant is sentenced to imprisonment in the institutional division of the Texas Department of Criminal Justice for life, the defendant will become eligible for release on parole, but not until the actual time served by the defendant equals 40 years, without consideration of any good conduct time. It cannot accurately be predicted how the parole laws might be applied to this defendant if the defendant is sentenced to a term of imprisonment for life because the application of those laws will depend on decisions made by prison and parole authorities, but eligibility for parole does not guarantee that parole will be granted."

(f) The court shall charge the jury that in answering the issue submitted under Subsection (e) of this article, the jury:

(1) shall answer the issue "yes" or "no";

(2) may not answer the issue "no" unless it agrees unanimously and may not answer the issue "yes" unless 10 or more jurors agree;

(3) need not agree on what particular evidence supports an affirmative finding on the issue; and

(4) shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness.

(g) If the jury returns an affirmative finding on each issue submitted under Subsection (b) of this article and a negative finding on an issue submitted under Subsection (e) of this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under Subsection (b) of this article or an affirmative finding on an issue submitted under Subsection (e) of this article or is unable to answer any issue submitted under Subsection (b) or (e) of this article, the court shall sentence the defendant to confinement in the institutional division of the Texas Department of Criminal Justice for life.

(h) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals.

(i) This article applies to the sentencing procedure in a capital case for an offense that is committed on or after September 1, 1991. For the purposes of this section,

an offense is committed on or after September 1, 1991, if any element of that offense occurs on or after that date.

Subsec. (e) amended by Acts 1981, 67th Leg., p. 2673, ch. 725, § 1, eff. Aug. 31, 1981. Amended by Acts 1985, 69th Leg., ch. 44, § 2, eff. Sept. 1, 1985; Acts 1991, 72nd Leg., ch. 652, § 9, eff. Sept. 1, 1991; Acts 1991, 72nd Leg., ch. 838, § 1, eff. Sept. 1, 1991; Subsec. (i) added by Acts 1993, 73rd Leg., ch. 781, § 1, eff. Aug. 30, 1993; Sec. 2(e) amended by Acts 1999, 76th Leg., ch. 140, § 1, eff. Sept. 1, 1999.

Former Texas Code of Criminal Procedure Article 37.071

Art. 37.071. Procedure in capital case

(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on or is unable to answer any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) If a defendant is convicted of an offense under Section 19.03(a)(6), Penal Code, the court shall submit the three issues under Subsection (b) of this article only with

regard to the conduct of the defendant in murdering the deceased individual first named in the indictment.

(g) The court, the attorney for the state, or the attorney for the defendant may not inform a juror or a prospective juror of the effect of failure of the jury to agree on an issue submitted under this article.

(h) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

Subsec. (e) amended by Acts 1981, 67th Leg., p. 2673, ch. 725, § 1, eff. Aug. 31, 1981. Amended by Acts 1985, 69th Leg., ch. 44, § 2, eff. Sept. 1, 1985.

Texas Code of Criminal Procedure Article 46.02

Art. 46.02. Incompetency to stand trial

Raising the Issue of Incompetency to Stand Trial

Sec. 2. (a) The issue of the defendant's incompetency to stand trial shall be determined in advance of the trial on the merits if the court determines there is evidence to support a finding of incompetency to stand trial on its own motion or on written motion by the defendant or his

counsel filed prior to the date set for trial on the merits asserting that the defendant is incompetent to stand trial.

(b) If during the trial evidence of the defendant's incompetency is brought to the attention of the court from any source, the court must conduct a hearing out of the presence of the jury to determine whether or not there is evidence to support a finding of incompetency to stand trial.

Examination of the Defendant

Sec. 3. (a) At any time the issue of the defendant's incompetency to stand trial is raised, the court may, on its own motion or motion by the defendant, his counsel, or the prosecuting attorney, appoint disinterested experts experienced and qualified in mental health or mental retardation to examine the defendant with regard to his competency to stand trial and to testify at any trial or hearing on this issue.

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No. 00-6677

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOHNNY PAUL PENRY,

Petitioner,

v.

GARY JOHNSON, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF

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QUESTIONS PRESENTED

1. Whether Penry's mitigating evidence was within the jury's effective reach under the instructions submitted at the punishment phase of trial.

2. Whether a report from a defense-requested, court-ordered psychiatric evaluation regarding an unrelated prior offense could be used by the State to rebut psychiatric evidence introduced by Penry at both phases of the trial.

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IN THE

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JOHNNY PAUL PENRY,

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

RESPONDENT'S BRIEF

Petitioner Johnny Paul Penry was properly re-convicted and sentenced to die for the brutal rape and murder of Pamela Carpenter. After the Court overturned the original conviction and sentence and ordered Penry retried, *see Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), Texas thoughtfully considered and faithfully followed the Court's directions. The court, the defense, and the prosecutors were all careful to ensure that the jury on the retrial properly considered Penry's mitigation evidence in assessing his sentence. The Court should affirm the Fifth Circuit's judgment because the state court decision that it reviewed was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by this Court.

STATEMENT OF THE CASE

On the morning of Thursday, October 25, 1979, Pamela Carpenter was home alone making Halloween decorations when she heard someone knocking at the door. It was Johnny Paul Penry. Pamela did not know Penry, but he had assisted in delivering appliances to her home earlier that month. Penry, who had recently been released on parole from a 1977 rape conviction, woke up that morning and decided to "go [back] over there and get me a piece." JA 1:12-13. Penry described the crime in his confessions:

> She came to the door and opened the wooden door and pushed the screen open a little ways. I asked her if her husband was there and she said no. Then I asked her if I could see her stove and she said, "What for?" I said I was going to fix the stove and she said, "What for, it's working?" She told me, "You better get out of here." That's when I jerked the screen door open, pulled my knife out and grabbed her. I pushed her back in the kitchen. She was screaming and hollering for help, and knocked the knife out of my hand. We fought in the kitchen a little bit. I slapped her in the face about once. I got her down on the floor and she said she was dizzy. I let her up but I held onto her. I looked out the door to see if anybody was coming. I kind of turned [my] back but I still had a hold of her. She picked up some scissors that had some orange handles. They were pretty big and looked like cutting scissors.
>
> She stabbed me in the back. I wrestled with her and took the scissors away from her. Then I started dragging her into the bedroom and she told her dog to bite me. He started trying to bite me and I kicked him in the throat and he landed under the bed. I don't know what happened to the dog after that. She was laying on her back [on] the floor and I was standing up. She said she wouldn't take her clothes off. I kicked her in the left side with my boots. She said just wait she'd take her clothes off. She sat up and pulled her pants down past her knees. I unzipped my pants and started to get on her. She got away from me and got up. The scissors were on the bedroom floor. I had dropped them there. She started for them and I kicked them out of her hand. I pushed her down to the floor and started to get on her again. I told her I'd kill her if she didn't make love to me. I hit her about 2 times in the chest and she said "O.K." she would. I went on and fucked her on the bedroom floor and then after I got through I got up and walked over to the kitchen door where the scissors had landed and picked them up. I walked back to her and got down on her. I sat down on her stomach and I told her that I loved her and hated to kill her but I had to so she wouldn't squeal on me. She didn't say anything and I stabbed her with the scissors. She leaned forward and pulled the scissors out of herself as I was getting up. I then ran out the door and boogied.

JA 1:13-15.[1]

After Penry ran out of the house, Pamela managed to get to the telephone and call a close friend, Cynthia Peters. Peters received the call at about 10:00 a.m. In what Peters described as a "real shaky" voice, she heard, "This is Pam. I have been stabbed and raped. Mother is at the church. Help me and hurry." R.42:130-32. Peters came to Pamela's aid, and a police officer and emergency medical technician arrived shortly thereafter. R.42:142. Pamela described her attacker

---

[1] Penry provided additional details regarding the rape and murder in his second confession. For example, Penry said that he knew before going to Pamela's house that he would have to kill her after he raped her because "she would tell who I was to the police and I didn't want to go back to the pen." JA 1:21. Penry also described how he selected the murder weapon: while he was raping Pamela, he "decided to kill her with the scissors since she stabbed me with them." JA 1:23.

as a white male, slender, and short with short black curly hair cut up over the ears. R.42:173-74. At about 10:30 a.m., Pamela arrived at the hospital, where she gave the same description of her assailant to the emergency medical technician, a nurse, and a doctor. R.42:205; R.43:262, 277. She also again stated that she had been raped. R.43:253, 262, 279. Pamela did not know her attacker's name, but she had seen him in the area. She was able to tell the medical personnel that her attacker had "used scissors" on her. R.43:262, 264, 278. Despite desperate life-saving efforts, Pamela died shortly after noon, a little more than two hours after Penry brutally attacked her. R.42:206; R.43:264. She was twenty-two years old. R.42:60.

Later that day, Penry—who fit the description of the attacker—was found with two fresh small puncture wounds close together on his back, R.42:209-210, which were consistent with being inflicted by the scissors found at the scene. R.44:515-17, 520, 643-44. Penry initially stated that his back injury occurred when he fell off of his bicycle that morning and landed on a stick. R.43:294, 324. Penry was read his warnings and stated that he understood them. Penry accompanied officers to the Carpenter residence where he remained unguarded in a patrol car with a door open. R.43:300-02. After about forty-five minutes, Penry called an officer over and stated, despite being told to be quiet, "I want to get it off my conscience, I done it." R.43:303-04, 314. Penry went inside the Carpenter residence and explained what had happened in detail, after which he was taken back to the police department and read his warnings by a justice of the peace. R.43:306, 351-52, 385. Before he could sign the warning form, Penry's father arrived and read the warnings to Penry again. R.43:353, 386. Penry then again admitted that he had raped and murdered Pamela Carpenter. R.43:357, 367. Later that day, Penry gave his first written confession. JA 1:11-16. The following day, October 26th, Penry gave a second written confession. JA 1:16-25.

An autopsy revealed that Pamela had a bruise near one eye, a bruise on her hip, and bruising on the neck that was consistent with strangling. A bruise on her chest in the shape of a shoe heel was consistent with having caused one of her kidneys to rupture and consistent with having been caused by one of the boots Penry was wearing at the time of his arrest. Finally, a stab wound to the chest, which went into the lung, was consistent with having been caused by the scissors recovered from the floor of the Carpenter's bedroom. R.44:637-41, 644-55; *see also* State's Exhibit 82 at 2073-79, 2087-92 (prior testimony of pathologist, deceased); R.42:197; R.43:253, 255-56, 277-78, 409.

Penry was indicted for capital murder on November 7, 1979. Tr 1:1. Following a competency hearing, Penry was tried and convicted of capital murder and sentenced to death on April 2, 1980. Nine years later, this Court granted habeas relief, holding that the three statutory special issues submitted to the jury at the punishment phase of trial, standing alone, precluded consideration of the mitigating effect of Penry's evidence of mental retardation and an abusive background. *Penry v. Lynaugh*, 492 U.S. 302 (1989). On remand, the federal district court entered an order on August 21, 1989, giving the State ninety (90) days to commute Penry's sentence or commence trial proceedings. Tr 1:32. Penry was appointed counsel within the district court's deadline; then Penry moved for, and was granted, additional time to prepare for trial. Tr 1:33-37. Various hearings on pre-trial matters were held in the ensuing months. A competency trial was held, and the jury found Penry competent to stand trial on May 16, 1990. Tr 1:100-01; JA 1:8.

The trial court then selected a separate set of jurors for the case-in-chief. Prior to the beginning of the initial group voir dire, Penry withdrew his previously filed notice of intent to raise an insanity defense. R.15:2. In an effort to comply with *Penry I*, the prosecutor informed venire members that, if

selected as jurors, they would be directed to take mitigating evidence into consideration in imposing punishment and discussed how to apply the punishment-phase instructions to give effect to that evidence in determining punishment. Thereafter, during individual voir dire examination, a copy of the mitigating-evidence instruction, which would ultimately be submitted at the punishment phase, *see* footnote 3, *infra*, was exhibited to venire members. The trial court, the prosecutor, and defense counsel explained to venire members the concept of mitigating evidence, the instruction, and how to apply the instruction in determining punishment.

The guilt-innocence phase of trial began on July 2nd. Tr 1:103. The entirety of Penry's first written confession and a portion of Penry's second written confession were admitted into evidence. R.43:399-407, R.44:569-78. Penry questioned the law enforcement officer who took his first confession regarding, *inter alia*, Penry's mental status, including whether the officer believed that Penry was mentally retarded; any special training the officer had received in dealing with mentally retarded people; the officer's knowledge of the facts contained in the confession prior to the interview; the form of explanations given to Penry regarding the warnings; and the form of questioning utilized. R.43:419-33. Penry questioned the law enforcement officer who took his second confession in a similar manner, including the officer's belief whether Penry was mentally "slow"; the form of explanations given to Penry regarding the warnings; and the form of questioning utilized. R.44:588-600. Penry questioned other law enforcement officers who had interactions with him around the time of the confessions on these same or similar topics. R.43:309-14, 361-66. Penry also questioned civilian individuals who had witnessed the confessions regarding Penry's behavior, verbal and otherwise, in their presence. R.43:449-50; R.44:611. The defense presented documentary evidence from Penry's youth tending to indicate: full scale IQ scores of between 51 and 60; an eagerness to please when taking the IQ

tests; brain damage and a moderate to severe perceptual-motor problem; and prior diagnoses of mental retardation. R.45:676-92. The State presented rebuttal evidence regarding Penry's mental status through the testimony of a psychiatrist, Dr. Fred Fason. R.46:786-813, 824-30.

The jury charge included instructions on capital murder, the lesser offense of murder, and the voluntariness of the confessions. JA 1:28-33. In closing argument, the State argued that Penry possessed the capacity to understand and waive his rights; Penry's confessions were voluntarily given and consistent with the evidence (including facts not known by law enforcement at the time of the interviews); Penry was not mentally retarded; and Penry possessed the capacity to act intentionally. R.46:856-77, 905-16. The defense argued that Penry's confessions were unreliable and should not be believed because: Penry is mentally retarded; Penry is easily led by and has a desire to please authority figures; the law enforcement officers knew all the details at the time of the interviews; and no direct forensic evidence linked Penry to the victim or the victim to Penry. R.46:882-901. The defense further argued that Penry did not possess the capacity to act intentionally because he is mentally retarded. R.46:898. On July 9th, the jury found Penry guilty of capital murder after deliberating for approximately two hours and thirty minutes. JA 1:1; Tr 1:103.

The punishment phase of trial began two days later, July 11th. Evidence of Penry's violent history, in and out of prison, was presented. Lay and expert witnesses discussed Penry's mental status and capabilities. Lay and expert opinions were offered on Penry's prospects for future violence. Lay witnesses described a history of childhood abuse, while expert witnesses offered their opinions regarding what effect this had on Penry. Records documenting Penry's mental status and capabilities, from a variety of sources, were presented. *See* JA 4:878-80.

The trial judge submitted to the jury the three special issues dictated by statute as well as a supplemental instruction directing the jury to consider mitigating evidence. JA 3:674-78. The State's opening and rebuttal argument spanned the record, discussing Penry's criminal history, behavior in prison, mental status, childhood abuse, and personal culpability. JA 3:595-617, 653-68. The overwhelming majority of defense summation focused on those latter three topics. JA 3:622-40, 649-51; *see also* JA 3:643-44 (discussing evidence of mental retardation in relation to deliberateness question). On July 17th, after deliberating for approximately three hours and forty minutes, the jury returned its punishment verdict. Tr1:104; *but see* R.51:1948, 1950 (indicating punishment deliberations lasting two hours and forty minutes). In accordance with state law, the trial court assessed punishment at death.

The Court of Criminal Appeals affirmed the conviction and sentence on direct appeal on February 22, 1995, rejecting claims that the punishment-phase instructions failed to cure the deficiency found by this Court in *Penry I* and that Penry's Fifth Amendment rights were violated by the admission of a 1977 psychiatric report (the Peebles report) at the punishment phase of trial. *Penry v. State*, 903 S.W.2d 715 (Tex. Crim. App. 1995); JA 1:2; JA 3:767-68, 780-82. On November 13, 1995, this Court denied Penry's petition for certiorari raising those same two claims. *Penry v. Texas*, 516 U.S. 977 (1995). When Penry raised his claim of punishment-phase instruction error on state habeas review, the Court of Criminal Appeals deferred to its finding on direct appeal. JA 4:841, 863. On federal habeas review, the lower federal courts found that the state court's decision was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by this Court. JA 4:886-93, 912-14, 919-20, 1025-36, 1040-44, 1047-49, 1061-62. This Court granted certiorari review of these two claims on November 27, 2000. *Penry v. Johnson*, 121 S. Ct. 563 (2000); JA 4:1063.

SUMMARY OF THE ARGUMENT

This case is not before the Court in the same posture as *Penry I*. Although bound by the special issues mandated by state statute, the trial court provided the jury with a supplemental instruction that clearly directed them to consider mitigating evidence and to give Penry a life sentence if they found that the evidence sufficiently lessened his moral culpability, regardless of the statutory special issues. The instruction was explained to the prospective jurors, collectively and individually, during voir dire, and defense counsel's closing remarks reminded the jurors in very simple terms how to apply the supplemental instruction. The jury was not instructed to disregard the law, the instructions, their oath, or the evidence. For these reasons, the lower court properly deferred to the state court's decision because the decision was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by this Court.

Penry's Fifth Amendment rights were not violated by the admission of the Peebles report at the punishment phase of trial after Penry injected mental health issues at both phases of trial. The Peebles report was the result of a psychiatric evaluation conducted more than two years before Penry murdered Pamela Carpenter at the request of Penry's own lawyer regarding an unrelated, non-capital charge. The report was admitted into evidence at the punishment phase of trial during cross-examination of Penry's expert witness on mental health issues after that witness testified that he had relied on the report in forming the opinions he had proffered to the jury on direct examination. The report was also proper rebuttal evidence to demonstrate that his IQ test results were not an accurate indicator of his mental abilities and that his violent behavior was attributable more to his anti-social personality than to his abusive background and alleged mental retardation. Finally, given that the sole "defense-damaging"

portion of the report was cumulative to the opinions of a number of witnesses, including Penry's own expert witness, error, if any, was harmless.

ARGUMENT

This case is before the Court on federal habeas review, and Penry agrees that the deferential standard of review under 28 U.S.C. § 2254(d), as amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("the AEDPA"), guides this Court's review of the questions presented. Pet. Br. at 11; *see also (Michael) Williams v. Taylor*, 529 U.S. 420, 429 (2000) ("Petitioner filed his federal habeas petition after AEDPA's effective date, so the statute applies to his case."). Under the amended provisions of Section 2254(d), a state prisoner may not obtain relief with respect to any claim that was adjudicated on the merits in state court proceedings unless the adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d). Section 2254(d)(1) provides the standard of review for questions of law and mixed questions of law and fact. *(Terry) Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). The Court's decision in *(Terry) Williams* makes clear that a federal court's discretion to grant a writ of habeas corpus is limited and the court may only issue a writ if the state court's decision was "contrary to" or "involved an unreasonable application of" established federal law. 529 U.S., at 412-13.

Under the "unreasonable application" clause, the Court may grant the writ if the state court identifies the correct governing legal principle but applies it incorrectly, or extends or refuses to extend a legal principle to an area outside the scope intended by this Court. *Id.*, at 408, 413. Furthermore, the state court's application of the law must be "unreasonable" in addition to being merely "incorrect." *Id.*, at 411. The Court explained, "Stated simply, a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable." *Id.*, at 409.

Under the "contrary to" clause of section 2254(d)(1), a federal court may grant the writ if the state court has arrived at a conclusion opposite to that reached by the Supreme Court on a question of law, or if the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts. *Id.*, at 412-13. With these principles in mind, the lower court's decision must, in all things, be affirmed.

I. THE STATE COURT'S DETERMINATION THAT THE PUNISHMENT PHASE INSTRUCTIONS DID NOT PRECLUDE CONSIDERATION OF CONSTITUTIONALLY RELEVANT MITIGATING EVIDENCE IS ENTITLED TO DEFERENCE.

The trial court did not ignore the Court's directive in *Penry I*, this case is not before the Court in the identical posture as *Penry I*, and the jury was not instructed to disregard the law, the instructions, their oath, or the evidence. The trial court listened carefully to this Court's directive and created a reasonable, workable solution to the unique circumstances presented in this case, circumstances that the Court most likely will never confront in any other case.

Following the Court's reversal of Penry's first death sentence, the federal district court entered an order on

August 21, 1989, giving the State ninety (90) days in which to commute Penry's sentence or commence trial proceedings. Tr 1:32. That order put the State in a difficult position. Although the State intended to amend the statutory scheme to create a separate special issue on mitigation, the order on remand required the State to retry Penry before the legislature had an opportunity to amend the statute. Although Penry explicitly waived any right of enforcement he may have possessed in relation to the district court's order in a request to postpone commencement of retrial proceedings, Penry explicitly reserved his "right to have a speedy trial." Tr 1:35. Balancing its obligation to follow state statutory procedures, this Court's holding in *Penry I*, and the district court's order, as well as Penry's veiled threat of raising a speedy trial violation, the trial court submitted a supplemental instruction to the jury regarding mitigating evidence. The instruction clearly directed the jury to consider mitigating evidence and to give Penry a life sentence if it found that the evidence sufficiently lessened his moral culpability, regardless of the statutory special issues.[2] The instruction was explained to the

[2] At the time of the district court's order, the Texas Legislature was not in session and the next regular session did not convene until January 8, 1991. *See* TEX. GOV'T CODE ANN. §301.001 (Vernon Supp. 1991) ("The legislature shall convene in regular session at 12 noon on the second Tuesday in January of each odd-numbered year."). Subsequently, in 1991, the legislature amended the capital sentencing statute to include a separate special issue on mitigation. The bill creating that amendment, Senate Bill No. 880, was introduced on March 11, 1991. S.J. OF TEX., 72nd Leg., R.S. 373 (1991). After its eventual passage, the amendment did not become effective until September 1, 1991, and expressly applied solely to offenses committed on or after its effective date. TEX. CRIM. PROC. CODE ANN. art. 37.071 §2(e) (Vernon Supp. 1992); *see Lagrone v. State*, 942 S.W.2d 602, 606 n.2 (Tex. Crim. App. 1997). It was not until 1993 when the legislature provided that the separate special issue on mitigation would be applied to offenses committed prior to September 1, 1991. TEX. CRIM. PROC. CODE ANN. art. 37.0711 §§1, 3(e) (Vernon Supp. 1994); *Lagrone*, 942 S.W.2d, at 606 n.2. Regardless of the subsequent statutory changes, Penry's jury was fully able to consider his

prospective jurors, collectively and individually, during voir dire, and defense counsel's closing remarks reminded the jurors in very simple terms how to apply the supplemental instruction. The lower federal courts properly deferred to the state court's decision because the decision was neither contrary to, nor involved an unreasonable application of, clearly established federal law, as determined by this Court. JA 3:780-82; JA 4:886-93, 1025-36, 1040-44.

A. The Court's holding in *Penry I*.

At his first trial, Penry presented evidence of childhood abuse and mental retardation in mitigation of a death sentence. In invalidating Penry's first death sentence, the Court found that the Texas special issues, standing alone, precluded consideration of the mitigating effect of Penry's evidence of mental retardation and abusive background in assessing punishment:

> The jury was never instructed that it could consider the evidence offered by Penry as mitigating evidence and that it could give mitigating effect to that evidence in imposing sentence.
>
> * * * *
>
> In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision.

Penry I, 492 U.S., at 320, 322, 328. Subsequently, the Court noted that the defect identified in *Penry I* was that the jury

mitigating evidence at his second trial. That the legislature later enacted a different mechanism to consider mitigating evidence does not suggest that the trial court's supplemental instruction was ineffective.

was prevented "from giving *any* mitigating effect to the evidence" at issue. *Saffle v. Parks*, 494 U.S. 484, 491 (1989) (emphasis added).

B. There is no reasonable likelihood that Penry's jury interpreted the punishment phase instructions to preclude consideration of constitutionally relevant mitigating evidence.

In order to be entitled to relief on this claim, Penry must demonstrate a "reasonable likelihood" that the jury interpreted the punishment phase instructions to preclude consideration of constitutionally relevant mitigating evidence. *Johnson v. Texas*, 509 U.S. 350, 367 (1993) (citing *Boyde v. California*, 494 U.S. 370, 380 (1990)); *see also* Pet. Br. at 12-13. The requirements of the Eighth Amendment are satisfied if the mitigating value of the evidence, as actually proffered at trial, is within the "effective reach" of the jury in responding to the punishment issues and instructions. *Johnson*, 509 U.S., at 368; *Graham v. Collins*, 506 U.S. 461, 475 (1993). "In evaluating the instructions, [a court should] not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would—with a 'commonsense understanding of the instructions in the light of all that has taken place at the trial.'" *Johnson*, 509 U.S., at 368 (quoting *Boyde*, 494 U.S., at 381).

1. The charge clearly instructed jurors to consider Penry's personal moral culpability and to impose a life sentence, if warranted.

Penry's death sentence was based upon the jury's affirmative responses to the following three statutory punishment phase issues:

> (1) Was the conduct of the defendant, JOHNNY PAUL PENRY, that caused the death of the deceased, PAMELA CARPENTER, committed deliberately and with the reasonable expectation that the death of the deceased or another would result?
>
> (2) Is there a probability that the defendant, JOHNNY PAUL PENRY, would commit criminal acts of violence that would constitute a continuing threat to society?
>
> (3) Was the conduct of the defendant, JOHNNY PAUL PENRY, in killing PAMELA CARPENTER, the deceased, unreasonable in response to the provocation, if any, by the deceased?

JA 3:676-77. To make certain it cured the deficiency recognized by this Court's holding in *Penry I*—that the special issues, standing alone, were insufficient to provide a vehicle for consideration of the mitigating effect of Penry's evidence of mental retardation and abusive background, *Penry I*, 492 U.S., at 328—the trial court gave the following supplemental instructions:

> You are instructed that if you return an affirmative finding on each of the special issues submitted to you, the court shall sentence the defendant to death. You are further instructed that if you return a negative finding on any special issue submitted to you, the court shall sentence the defendant to the Texas Department of Corrections for life. You are therefore instructed that *your answers to the special issues, which determine the punishment to be assessed the defendant by the court, should be reflective of your finding as to the personal culpability of the defendant*, JOHNNY PAUL PENRY, in this case.
>
> You are instructed that when you deliberate on the questions posed in the special issues, *you are to consider*

mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the state or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case. If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. *If you determine, when giving mitigating effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues.*

JA 3:674-75 (emphasis added).

Contrary to Penry's assertions, the instructions given in this case did not impermissibly limit the jury's ability to consider and give effect to his mitigating evidence. The trial judge specifically instructed the jury to consider Penry's personal moral culpability and then told the jury how to impose a life sentence, if warranted. The trial court told the jury to simply answer one of the special issues "no" if it believed that mitigating circumstances made a life sentence an appropriate response to Penry's personal culpability. Further, the instruction did not specifically require mitigating evidence to fall under the literal language of the special issues, although much of Penry's mitigating evidence was relevant to the deliberateness prong of the first question. In any event, the instructions informed the jury how to give effect to mitigating evidence and impose a life sentence regardless of its initial answers to the questions. While the "as reflected by a negative finding" phrase in the final

sentence was less than artful, the instruction as a whole adequately informed the jury how to impose a life sentence, if warranted.

There is no reasonable likelihood that the jury felt that it could not do that which the instructions specifically required. For the jury to believe that it could not give effect to mitigating evidence in the manner dictated by the charge would have rendered meaningless both the extensive mitigation instruction itself and the mitigating evidence that required it. *See Boyde*, 494 U.S., at 383 (finding jurors unlikely to construe instructions so as to transform defendant's presentation of "favorable testimony into a virtual charade") (citation omitted). The Court's core concern in *Penry I*, that "[t]he jury was never instructed that it could consider the evidence offered by Penry as mitigating evidence and that it could give mitigating effect to that evidence in imposing sentence," *Penry I*, 492 U.S., at 320, was satisfied in this case.

2. Any ambiguity in the charge itself was clarified by statements of the trial court judge, the prosecutors, and defense counsel.

Even if the language of the charge, standing alone, was ambiguous, when viewed "with a commonsense understanding of the instructions in the light of all that has taken place at the trial," *Johnson*, 509 U.S., at 368 (internal quotes and citation omitted), it is clear that Penry's jury could not have felt precluded from giving mitigating effect to his evidence. Contrary to Penry's assertions that it was solely defense counsel who explained to the jurors how to apply the supplemental instruction, Pet. Br. at 20-21, the conduct of all the participants throughout the proceedings supports the conclusion that Penry's mitigating evidence was within the jury's effective reach.

During the initial group jury voir dire, the prosecutor specifically told the venire that jurors would be instructed to take mitigating evidence into consideration and:

> . . . if you feel like that [mitigating] evidence is strong enough that you feel like it would even warrant a lesser sentence than death . . . then you can answer one or more of these questions no, so that the defendant will receive a life sentence instead of the death penalty.

JA 1:9-10. The prosecutor followed up on this explanation during individual voir dire. For example, during the individual voir dire of William Franz, the first venire member ultimately selected to serve on the jury, the following exchanges occurred during the prosecutor's questioning:

> Q: . . . Now, this [supplemental] instruction . . . is almost like a fourth issue in that you will hear this other evidence that comes in about the defendant, and you will take that into consideration when you are answering these three [special issues], but you can also take that evidence independently, even if you felt like the answers to these three questions was yes, if you felt like there was something in the defendant's background that the death penalty would not be appropriate, pick them all out, or pick one of them out and answer no. Do you feel like you can do that?
>
> A: Yes.
>
> * * * *
>
> Q: Now, if you are on this jury, and you look at the evidence like I have talked about on these three issues here, you look back at the facts of the crime and you believe that should be answered yes, and you look to the second one, you look at the facts and the defendant's background, you think that should be yes, and you look at, again, the facts of the case and you believe number three should be yes, but if then you look at the mitigating

> evidence and you felt like that because of this mitigating evidence that the death penalty wouldn't be appropriate, if you felt like that indeed somehow the defendant's blame to this offense was reduced, could you then answer one of these issues no and in effect give the defendant a life sentence?
>
> A: Yes, I could.
>
> Q: Because that is what you would be sworn to do, and if you felt that way, you would be sworn to do that, and I just want to make sure that you can.
>
> A: Yes.
>
> Q: The other side of the coin is if you answered these three issues yes, and if you looked at this instruction and you weighed that mitigating evidence, if you decided in your mind that this mitigating evidence did not lessen the blame or did not lessen it to the extent that the death penalty would be inappropriate, if you just didn't think the mitigating evidence was strong enough, could you still answer these three issues yes, and in fact give the defendant a death sentence?
>
> A: Yes, sir, I do.

R18:854-55, 866-67. The voir dire questioning of the remaining venire members ultimately selected to decide this case, *see* Tr 3:774 (list of jurors chosen), reflects similar comments from the prosecutor *and* the trial court regarding the supplemental instruction. In each case, the supplemental instruction was exhibited and explained to the venire member, and any confusion arising from a venire member's initial exposure to the instruction was addressed until resolved. R.18:966-67, 980-81, 990 (Lloyd Davis); R.20:1287-88, 1315, 1318, 1321-22 (Gary McClure); R.22:1764-65, 1787, 1790-92 (David Moreno); R.23:2004, 2025-26, 2036-37 (Forest Marler); R.23:2144-45, 2168, 2171 (Mary Yarbrough); R.26:2751-52, 2776-77 (Machere

Gillaspie); R.27:2901-02, 2930-31, 2942-43 (Thomas Roberts); R.28:3330-31, 3359-62 (Earl Fountain); R.32:4466-67, 4481-86, 4488 (Diane Wood); R.34:344-45, 359-60 (Douglas Massey); R.35:751-52, 768-69, 774 (Mark McElligott); *see also* defense counsel questioning at R.18:1018; R.20:1397; R.23:2224; R.26:2800, 2841; R.27:2947, 2952-53, 2955, 3012-13; R.28:3386-87; R.32:4556-58, 4562; R.34:418.[3]

During closing arguments, at no time did the prosecutors argue that the jury could not or should not vote "no" on a special issue unless Penry's evidence was directly relevant, in a mitigating fashion, to one of the three special issues. To the contrary, when prosecutors discussed mitigating evidence during punishment phase summations, they focused on the fact that Penry's violence was not attributable to alleged mental retardation and childhood abuse and, therefore, his blameworthiness and culpability were not reduced.[4] *See, e.g.*, JA 3:611-17, 664-67.

Consistent with the remarks of the trial court and the prosecutor during voir dire, defense counsel's closing remarks reminded the jurors in very simple terms how to

[3] The supplemental instruction ultimately given was identical to the sample supplemental instruction exhibited during voir dire with the exception that the voir dire exhibit concluded with "a negative finding should be given to that special issue under consideration" as opposed to "a negative finding should be given to one of the special issues." *See* JA3:723-24. At trial, Penry called the change a "slight improvement to the Charge." R.50:1812.

[4] Penry's claim of mental retardation was vigorously disputed by the State at trial. Penry's claim of childhood abuse was not as vigorously disputed. For example, during closing arguments, while the prosecutors did not dispute that Penry had been abused and had suffered a "bad childhood," they asked the jury to consider whether testimony regarding the extent of the alleged abuse was credible. JA 3:604-08, 610-11, 615, 661-64.

apply the supplemental instruction in determining the appropriate punishment:

> Let me try to simplify it. If, when you thought about mental retardation and the child abuse, you think that this guy deserves a life sentence, and not a death sentence, decide life in prison is punishment enough, then, you['ve] got to answer one of those questions no. The Judge has not told you which question, and you have to give that answer, even if you decide the literally correct answer is yes. Not the easiest instruction to follow, and the law does funny things sometimes, but, it is what it says, and I have taken all this time with you to make sure you understand what it says.
>
> If you think that because of this mitigating evidence the man deserves a life sentence, then, there has got to be a no on that verdict sheet somewhere.

JA 3:640.

This case does not present facts "materially indistinguishable" from *Penry I*, and the state court's decision that Penry's jury possessed an adequate vehicle for consideration of mitigating evidence was not objectively unreasonable. All the parties were operating on the same permissible understanding of the mitigation instruction, and the instruction specifically directed the jury to answer any special issue "no" if it believed mitigating evidence called for a life sentence. There simply is no reasonable probability that the jury misinterpreted the instruction to preclude consideration of constitutionally relevant mitigating evidence.

C. The charge was not an unconstitutional "nullification" instruction.

Penry erroneously argues that the supplemental instruction was an unconstitutional "nullification" instruction under *Roberts v. Louisiana*, 428 U.S. 325 (1976). In *Roberts*, the Court declared unconstitutional Louisiana's mandatory death

sentence statute because it failed to comply with the requirement of *Furman v. Georgia*, 408 U.S. 238 (1972), that standardless jury discretion be replaced by procedures that safeguard against the arbitrary and capricious imposition of death sentences. *Roberts*, 428 U.S., at 334. Under the Louisiana system, once a jury found a defendant guilty of first-degree murder, the defendant would be automatically sentenced to death; however, the jury in every first-degree murder case was instructed on the crimes of second-degree murder and manslaughter and permitted to consider those verdicts even if there was not a scintilla of evidence to support the lesser verdicts. *Id.* At the same time, however, the jury was instructed "to return a guilty verdict for the offense charged if warranted by the evidence and to consider lesser verdicts only if the evidence does not justify a conviction on the greater offense." *Id.*, at 334 n.10. The Court found that there was "an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept this invitation to disregard the trial judge's instructions." *Roberts*, 428 U.S., at 335.

Unlike *Roberts*, the jurors in this case were neither instructed nor invited to disregard the law, the instructions, their oath, or the evidence; instead, the jury was instructed how to obey the law (as decided by this Court and set forth by the trial judge) by imposing a life sentence ("reflected by a negative finding") if the jury found that it was appropriate. *See* JA 4:1044 ("The jury was not told to disregard the law; rather, it was instructed on how to obey the law, as explained by the Supreme Court in *Penry I*.").[5]

[5] Penry misquotes *Roberts* in an attempt to stretch that case to his argument regarding nullification. *See* Pet. Br. at 22 (substituting "the law" for "the trial court's instructions" in the above quoted sentence). Regardless, even with Penry's misrepresentation, *Roberts* is irrelevant because the jury in the instant case was neither instructed nor invited to disregard the law, the instructions, their oath, or the evidence.

Further, *Roberts* is entirely irrelevant in light of the material differences between the capital sentencing at issue in *Roberts* and the Texas scheme. While *Roberts* involved a mandatory capital sentencing statute, Penry's trial was bifurcated into separate guilt-innocence and punishment phases.

> Elimination of the mandatory-sentencing procedure also eliminates the problem of the possibility of jury nullification which has been known to arise under mandatory schemes. If a jury does not believe that a defendant merits the death sentence and it knows that such a sentence will automatically result if it convicts the defendant of the murder charge, the jury may disregard its instructions in determining guilt and render a verdict of acquittal or of guilty of only a lesser included offense. . . . The guided-discretion statutes that we have upheld . . . provide for bifurcated trials in capital cases to avoid nullification problems. Bifurcating the trial into a guilt-determination phase and a penalty phase tends to prevent the concerns relevant at one phase from infecting jury deliberations during the other.

Sumner v. Shuman, 483 U.S. 66, 85 n.13 (1987) (citation omitted); *see also Graham v. Collins*, 506 U.S., at 486 (Thomas, J., concurring) (Mandatory death statutes like those in *Roberts* were invalidated for three reasons, one being that "experience had suggested that such statutes 'simply papered over the problem of unguided and unbridled jury discretion' by provoking arbitrary jury nullification") (citation omitted).

Because Penry's trial was bifurcated, and because the jury was able to exercise guided discretion at the punishment phase, it was empowered to effectively assess a life sentence without resort to nullification of the law as defined by this Court's jurisprudence. Thus, the concerns of *Roberts* are not present.

For all of the above reasons, the lower courts' rejection of Penry's claim concerning the punishment phase jury instructions was entirely correct under the AEDPA standard of review. This case does not present facts "materially indistinguishable" from this Court's precedent. And, even assuming *arguendo* that the underlying state court decision was erroneous, it certainly was not objectively unreasonable.

II. THE STATE COURT'S DETERMINATION THAT PENRY FAILED TO DEMONSTRATE A FIFTH AMENDMENT VIOLATION IS ENTITLED TO DEFERENCE.

Just as a criminal defendant possesses a right to a fair trial, so too does the State. A criminal defendant does not possess a constitutional right to offer mental health evidence at both phases of a bifurcated trial while prohibiting the State from offering rebuttal evidence on the same topic. Creating such a windfall for a criminal defendant would be a drastic departure from this Court's existing jurisprudence and would serve no purpose other than to encourage manipulation of the truth-seeking function of the adversarial process. The lower federal courts properly deferred to the state court's decision rejecting Penry's Fifth Amendment claim because the decision was objectively reasonable and not contrary to this Court's clearly established precedent. JA 3:767-68; JA 4:1047-49, 1061-62.

A. Penry's case does not implicate the Fifth Amendment concerns of *Estelle v. Smith*.

In *Estelle v. Smith*, 451 U.S. 454 (1981), a capital murder defendant was subjected to a court-ordered psychiatric examination to determine his competency to stand trial for capital murder. It was disputed whether Smith's counsel received prior notice that the examination was to take place,[6]

[6] Subsequent to the examination, the psychiatrist submitted a letter to the trial court opining that Smith was competent to stand trial and Smith

but it was not disputed that the defense did not request the examination and did not place Smith's mental status at issue in pretrial pleadings or at trial. 451 U.S., at 457 n.1, 458 n.5. At the punishment phase of trial, the State presented no witnesses in its case-in-chief, while Smith called three witnesses—his stepmother, his aunt, and the man who owned the gun that Smith possessed during the commission of the offense—none of whom testified regarding his mental status. *Id.*, at 458. In rebuttal, the psychiatrist, who examined Smith pursuant to the trial court's order, and who was not listed on the State's witness list, was permitted to testify on behalf of the State concerning Smith's future dangerousness.[7] *Id.*, at 459. The Court held that such testimony violated Smith's Fifth Amendment privilege against self-incrimination:

> A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding.

Id., at 468. The Court also recognized that "a different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase." *Id.*, at 472.

This case is distinguishable from *Estelle v. Smith* on numerous levels: Penry requested the examination in

was "a severe sociopath," but containing no specific reference to his future dangerousness. *Estelle v. Smith*, 451 U.S., at 457-59. "Defense counsel discovered the letter at some time after jury selection began." *Id.*, at 459 n. 5.

[7] The psychiatrist testified to Smith's jury that: Smith was "a very severe sociopath"; Smith would "continue his previous behavior"; Smith's sociopathy would "only get worse"; Smith had no regard for human life; no treatment was possible; Smith would "commit other similar or same criminal acts if given the opportunity"; and Smith felt "no remorse or sorrow for what he has done." *Id.*, at 459-60. This is a far cry from Dr. Peebles's single sentence that if Penry "were released from custody [] he would be dangerous to other persons." *See* JA 1:60; Pet. Br. at 6, 35.

question; Penry was not charged with capital murder at the time of the examination, and in fact had yet to commit capital murder; the Peebles report could not have been based, obviously, on any testimonial statements regarding the murder; Penry placed his mental status at issue throughout both phases of trial; and the Peebles report was admitted into evidence during cross-examination of Penry's own mental health expert after that witness testified that he relied on the report in forming the defense-favorable opinions he proffered to Penry's jury.[8] JA 1:114, 125, 141-43, 172, 210; JA 2:326-27, 345-46; R.45:678-692; R.46:882-901. Given the stark contrast between the record in this case and that presented in *Estelle v. Smith*, the state court's holdings—that *Estelle v. Smith* was inapplicable to the instant case, and that the Fifth Amendment was not implicated because Penry made his statements "two years prior to the offense at issue here and thirteen years prior to [his] capital murder trial"—were neither unreasonable nor contrary to this Court's precedent. JA 3:767-68, JA 4:1048-49; *see also Estelle v. Smith*, 451 U.S., at 466 (limiting the Court's holding to the "distinct circumstances" of Smith's case). Finally, the state court reasonably declined to extend *Estelle v. Smith* to the facts of Penry's case.[9]

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[8] Unlike *Estelle v. Smith*, Penry's attorneys were certainly aware of Dr. Peebles's reference to "future dangerousness" well prior to trial.

[9] If the rule in *Estelle v. Smith* extends to the facts of Penry's case, where the examination was conducted at the request of defense counsel pursuant to an unrelated prior rape charge, then one may question whether the results of *any* previous court-ordered examination would be admissible at a later trial, even if such a use was unforeseeable at the time of the examination. For example, would *Estelle v. Smith* bar the results of a court-ordered examination related to a civil commitment proceeding at a subsequent, unrelated criminal trial that could not have been contemplated at the time of the original examination? Moreover, if *Estelle v. Smith* applied to such a case, what type of warnings would prevent a Fifth Amendment violation from arising in connection with that examination?

B. Alternatively, even if Penry's case implicates the Fifth Amendment, the *Buchanan* exception applies.

In any event, Penry's situation is more analogous to *Buchanan v. Kentucky*, 483 U.S. 402 (1987), where the Court explained one of the "different situation[s]" mentioned in *Estelle v. Smith*. In *Buchanan*, the Court held:

> if a defendant requests [a psychiatric] evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution.

Buchanan, 483 U.S., at 422-23. The Court reasoned, "with petitioner not taking the stand, the [State] could not respond to this defense unless it presented other psychological evidence." *Id.*, at 423. Thus, just as a defendant who takes the witness stand waives his Fifth Amendment privilege and may be impeached with prior, unwarned statements,[10] a defendant who uses psychiatric evidence at trial waives his right to exclude other, admissible psychiatric evidence.[11]

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[10] *See, e.g., Harris v. New York*, 401 U.S. 222, 225-26 (1971).

[11] Given the instant record, Penry's focus on a "State agency" theory, isolated from the other factors in the record, is entirely myopic. First, Penry cites only pre-*Buchanan* authority to support his "State agency" theory, with the exception of a 1994 district court opinion, but not one of these decisions turned on Penry's illusory agency premise. *See Battie v. Estelle*, 655 F.2d 692, 702 (CA5 1981) (holding that "a defendant can invoke the protection of the [*Estelle v. Smith*] privilege *when he does not introduce mental health expert testimony*" (emphasis added)); *Hargrave v. Wainwright*, 804 F.2d 1182, 1191 (CA11 1986) (holding that "there is no constitutional error when the State introduces psychiatric or psychological evidence during the penalty stage of a bifurcated trial to counter other psychiatric or psychological evidence the defendant has announced he

It is, of course, undisputed that Penry presented psychological evidence at both phases of trial. Primarily, the Peebles report rebutted Penry's mitigation arguments during the punishment phase. In response to the defense evidence that Penry was truly as mentally retarded as his test scores indicated, the report supported the testimony of the State's rebuttal experts that Penry was actually malingering regarding his mental abilities. *See* JA 3:550, 552 (testifying that Penry would use mental retardation as an excuse for his behavior); *see also* JA 2:478 (testifying that the presence of an anti-social personality disorder is a factor in the analysis of whether someone is malingering).

Additionally, using anecdotal evidence and the expert testimony of Dr. Price, a clinical and neuro-psychologist who based his opinions in part on an eleven-hour examination of Penry, the defense sought to persuade the jury that Penry's violence was attributable to childhood abuse and mental retardation or brain impairment. For example, Dr. Price testified that "brain impairment of this type, causes the person problems in areas such as . . . impulse control, . . . tolerance, it decreases that. It affects their judgment and their ability to reason." JA 2:279-84. In rebuttal, the State presented evidence, including the Peebles report and expert testimony, that Penry's violence was attributable to his anti-social personality rather than to childhood abuse and mental

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will proffer"); *Tuggle v. Thompson*, 854 F.Supp. 1229, 1242 (W.D. Va. 1994) (holding that defendant does not waive Fifth Amendment when he does not present his own psychiatric testimony). Second, post-*Buchanan* circuit precedent also rejects Penry's agency theory. *See, e.g., Schneider v. Lynaugh*, 835 F.2d 570, 575-76 & nn.17, 24 (CA5 1988); *Giarratano v. Procunier*, 891 F.2d 483, 488 (CA4 1989); *Pawlyk v. Wood*, ___ F.3d ___, 2001 WL 46575 at *6 (CA9 January 19, 2001). Finally, the Fifth Circuit recognized as much in its opinion on Penry's petition for rehearing, explaining that *Buchanan* abrogated the agency considerations of *Estelle v. Smith* when a defendant requests an examination or presents psychiatric evidence at trial. JA 4:1061-62.

retardation, if any. The prosecutor made this point in his cross-examination of Dr. Price:

> Q: [Y]ou are telling this jury that he is mentally retarded . . . and that, that could be a contributing cause to the criminal acts, is that right?
> A: In so many words.
> Q: Is that what you told this jury on direct examination?
> A: That, it influences that he has engaged in criminal activities?
> Q: Psycho-path also, does the same thing, doesn't it, Doctor?
> A: Certainly.

JA 2:303. Dr. Price summarized his opinion by testifying that Penry "looks more like people with brain damage that I have seen than those with anti-social personality." JA 2:322. He added, "I think in this particular case, that the extent of mental retardation and brain impairment are substantial factors in the development of anti-social behavior in Johnny Paul Penry." JA 2:414. The State's rebuttal experts, however, testified that Penry's violence was more attributable to his anti-social personality than to any mental retardation. *See, e.g.*, JA 2:461, 482-85 (testifying that incidents of violence are not higher among the mentally retarded); JA 3:554 (testifying that "Penry was a person who really, simply made a series of choices over time not to live within the . . . norm [*sic*] and standards of society," and that this was consistent with an anti-social personality disorder but probably inconsistent with mental retardation).

The Peebles report was also relevant to rebut portions of Penry's mental health records submitted by the defense at the guilt-innocence phase of his trial. R.45:674-77. Those selected by Penry reflected his low scores on intelligence tests as well as the examiners' impressions that Penry was doing his best and trying to please. R.45:678-92. This

evidence, if credited, supported the defensive theories that Penry lacked the mental capacity to knowingly and intelligently waive his *Miranda*[12] rights, that Penry falsely confessed in order to please the authority figures represented by law enforcement officers, and that Penry was incapable of acting with criminal intent. *See* R.46:893-99 (urging these theories during guilt-innocence phase summation); *see also* JA 3:643-44 (arguing in punishment-phase summation that Penry's admission in his confession that he knew beforehand that he was going to have to kill the victim was false because mentally retarded people such as Penry want to appear smart and do not want to admit they have acted rashly).

The Peebles report, admitted at the punishment phase, additionally reinforced the testimony of State's witness Dr. Fason on rebuttal at the guilt-innocence phase that, despite Penry's below normal scores on intelligence tests, Penry's intellect and adaptive skills rendered him capable of understanding and waiving his *Miranda* rights, and capable of correctly relating the facts set forth in his confessions. R.46:766-68, 787-88. It further supported Dr. Fason's testimony that Penry had an anti-social personality, a factor which Dr. Fason testified could explain Penry's low scores on intelligence tests and also indicated that Penry was unlikely to falsely confess due to a desire to please authority figures. R.46:766, 790-91, 796-805.

Given the record in this case, Penry erroneously attempts to distinguish his case from *Buchanan* by arguing that the only mental status issue he raised was the issue of mental retardation and that he did not present evidence that he was *not* dangerous. This Court did not premise the *Buchanan* exception on any specific mention of future dangerousness by the defense expert; indeed, to do so would have led to confusion and subterfuge as expert witnesses learned to avoid

[12] *Miranda v. Arizona*, 384 U.S. 436 (1966).

using such specific terms. What Penry's argument ignores is that one of the issues raised by Penry before the jury at the punishment phase was to *what* factors Penry's violence was attributable. The report was proper rebuttal evidence on that topic, as well as the others noted above. In light of the many issues raised by the defense to which the report was proper rebuttal, and considering that the facts of Penry's case are materially indistinguishable from *Buchanan*, the state court's conclusion that no Fifth Amendment violation occurred was not contrary to, or an objectively unreasonable application of, clearly established Supreme Court precedent.

C. The admission of the Peebles report, even if it was error, did not have a substantial and injurious effect on the punishment verdict.

Fifth Amendment violations are subject to harmless error analysis. *Chapman v. California*, 386 U.S. 18, 22 (1967); *Brecht v. Abrahamson*, 507 U.S. 619, 622-23 (1993); *see also Satterwhite v. Texas*, 486 U.S. 249, 258 (1988) (applying harmless error analysis to Sixth Amendment violation under *Estelle v. Smith*). On federal habeas review, the inquiry is whether the error had a "substantial and injurious" effect on the verdict. *Brecht*, 507 U.S., at 637.

Penry asserts that the defense-damaging portion of the Peebles report is "its devastating statement about Penry's dangerousness." Pet. Br. at 36. That statement, *i.e.*, "if Johnnie [*sic*] Paul Penry were *released from custody* [] he would be dangerous to other persons," JA1:60 (emphasis added), was hardly a surprising proposition given Penry's criminal history, including the facts of the instant offense. Regardless, Penry's own expert, Dr. Price, opined that if Penry "was *in the free world*, I would consider him dangerous." JA 2:392 (emphasis added). It is difficult to believe that the Peebles report had any significant impact on the jury's verdict in this case where Penry's own expert testified to the exact same conclusion. Further, the jury heard

the testimony of four prison guards and the State's rebuttal expert witnesses that they believed Penry would be a future danger, and the jury read for themselves the inculpatory and remorseless statements in Penry's confessions. JA 1:11-25, 81-83, 92-94, 103-04, 136-38; JA 2:487; JA 3:557; R.47:970.

Finally, the offending statement is, at least in part, irrelevant to the verdict. The jury in this case was asked to determine whether there was "a probability that . . . Penry would commit criminal acts of violence that would constitute a continuing threat to society." JA 3:677. Because the jury was also instructed that life imprisonment was the only alternative to a death sentence, JA 3:672, a critical inquiry for the jury was whether Penry would be dangerous while incarcerated. *See also* JA 3:622 (defense arguing for "no" answer to future dangerousness special issue because "Johnny Paul Penry, in prison will not be a dangerous man, not the kind of danger that you should answer yes" to that issue); JA 3:648-49 (defense arguments that Penry "is not dangerous in prison. . . he is not a rape or murder waiting to happen. . . . He is someone the prison system can handle."). Therefore, Drs. Peebles's and Price's opinions on Penry's dangerousness *if released from custody* would have had little or no impact on the jury's verdict, much less a substantial or injurious effect.

For all of these reasons, even assuming *arguendo* that the admission of the Peebles report was error under *Estelle v. Smith* or *Buchanan*, any such error was harmless as a matter of law, and habeas relief was reasonably denied.

CONCLUSION

For the foregoing reasons, the Director respectfully requests that the lower court's decision be affirmed.

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In the Supreme Court of the United States

JOHNNY PAUL PENRY,
Petitioner,

v.

GARY L. JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

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ARGUMENT IN REPLY

Petitioner ("Penry") submits this brief in reply to the respondent's brief ("Resp. Br.") and the briefs of amici curiae Justice for All ("JFA Br."), Criminal Justice Legal Foundation ("CJLF Br.") and the State of Alabama ("Ala. Br.") (collectively the "Opposing Briefs").[1/]

[1/] In recent weeks, this Court has issued stays in two cases raising the question of whether there now exists a national consensus against executing a mentally retarded person, so that such executions are categorically prohibited by the Eighth Amendment. *See McCarver* v. *North Carolina*, No. 00-8727, 2001 WL 206050 (Mar. 1, 2001) (Mem.); *Richardson* v. *Luebbers*, No. 00-8810, 2001 WL 219434 (Mar. 6, 2001) (Mem.). Although this question was not presented by Penry's petition to this Court, it was preserved and argued by Penry in the Courts below. *See* JA 3:785-86 (Texas Court); JA 4:893-902 (District Court); JA 4:1050-51 (Court of Appeals). This Court therefore has the power, if it chooses to exercise it, to reach this question in Penry's case. *See Piper Aircraft Co.* v. *Reyno*, 454 U.S. 235, 247 n.12 (1981); *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 32 (1993).

I.

THE OPPOSING BRIEFS FAIL TO SHOW THAT PENRY'S SECOND TRIAL COMPLIED WITH *PENRY I*

As Penry's brief on the merits demonstrates, the procedure followed in this case violated *Penry I* by requiring the jury to answer the same three questions which, as the *Penry I* Court held, gave the jury insufficient scope to consider Penry's mental retardation and child abuse. (Petitioner's Brief ("Pet. Br.") at 12-21) The only possible escape from this conclusion would be to label the trial court's instruction, as the Texas Court of Criminal Appeals did, a "nullification instruction" -- one which told the jury that it could give false answers to the questions asked. As Penry's prior brief also demonstrates, such a nullification instruction, if given, would be unconstitutional under *Roberts* v. *Louisiana*, 428 U.S. 325 (1976). (Pet. Br. at 21-23)

Respondent and its allied amici seek to find some middle ground -- to show that the instruction neither limited the jury to the questions asked, nor told the jury to nullify. But there is no middle ground, and as a result, the Opposing Briefs take confusing and contradictory positions. Indeed, they seem to agree only in admitting that the trial court's instruction was flawed (while insisting the flaw was not of constitutional magnitude). Respondent calls the instruction "less than artful" (Resp. Br. at 17) and two of the amici agree: "perhaps not perfect in every detail" (Ala. Br. at 19); "not the optimum way to write instructions." (CJLF Br. at 15)

Two of the Opposing Briefs say, in substance, both that the instruction was not a nullification instruction and that it was.

Respondent's brief states that "the jury was not instructed to disregard the law, the instructions, their oath, or the evidence" but also that the instruction told the jury to render a decision "regardless of its initial answers to the questions." (Resp. Br. at 11, 16) The Criminal Justice Legal Foundation criticizes the Texas Court of Criminal Appeals for a "poor choice of words" in speaking of a "nullification instruction," but then goes on to imply that the instruction directed an answer "different from the answer to the bare question." (CJA Br. at 16, 17) Thus, both briefs describe what the instructions did in words that could serve to define the term "nullification." Another amicus argues that the instruction could be read as nullifying or not -- as either "broadening the special issues . . . or as a type of 'nullification instruction'." (Ala. Br. at 24) A third amicus argues that there was not, and did not need to be, any instruction to nullify, but does not address the question of why the Texas Court of Criminal Appeals apparently thought otherwise. (JFA Br. at 11-13)

Thus, it is impossible to glean from the Opposing Briefs a consistent view of how the Texas court's instruction supposedly cured the *Penry I* error: Did it do so by altering the meaning of the questions, or by telling the jury to ignore them? The briefs of respondent, the Criminal Justice Legal Foundation and the State of Alabama argue primarily for the former (Resp. Br. at 11, 16; CJLF Br. at 14-15; Ala. Br. at 24), though at places they argue inconsistently for the latter position as well (Resp. Br. at 16; CJLF Br. at 15, 17; Ala. Br. at 20, 24). Justice for All, by contrast, embraces the latter view, arguing that the question of whether Penry acted "deliberately" gave the jury sufficient scope to consider mitigating evidence. (JFA Br. at 11-14) It is fair to ask how the jury was supposed to understand the trial court's instruction if the authors of the Opposing Briefs cannot agree on what it means.

The source of the Opposing Briefs' confusion is that they are struggling to do the impossible: to reconcile the procedure the Texas court followed with *Penry I*. Indeed, the Opposing Briefs repeatedly concede that it was difficult, if not impossible, for the trial court to comply with *Penry I* without departing from the Texas statutory scheme. Respondent notes that the state was in a "difficult position," because Penry's second trial began before the Texas legislature could meet to correct the statute. (Resp. Br. at 12) The State of Alabama notes that "*Penry I* did not explain how a Court could instruct a jury to give effect to its 'reasoned moral response' (giving the jury discretion to consider a broad range of mitigating evidence) in the context of the Texas statute . . . ." (Ala. Br. at 23) And Justice for All appears to reargue *Penry I*, insisting that the first special issue in the old Texas statute -- "even without the additional instruction given in this case" -- gave the jury broad scope to consider mitigating evidence. (JFA Br. at 11-12) Justice for All's argument flatly contradicts the holding of *Penry I*:

> In the absence of jury instructions defining "deliberately" in a way that would clearly direct the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability, we cannot be sure that the jury was able to give effect to the mitigating evidence of Penry's mental retardation and history of abuse in answering the first special issue.

492 U.S. at 323. The Opposing Briefs thus reinforce the conclusion that the Texas statute, as the Texas court applied it here, and the *Penry I* decision are not reconcilable.

As the above-quoted language shows, the *Penry I* Court effectively invited the Texas courts to comply with its holding through a definition of the term "deliberately." Why the trial court in this case did not take up that invitation is a mystery on which the Opposing Briefs shed no light. Absent such a definition, it is clear from *Penry I* that the Texas statute, as applied to this case, was on a collision course with the Eighth Amendment to the United States Constitution -- and of course it is the statute, not the Constitution, that must give way. The Texas court failed to accept this principle, and thus repeated the *Penry I* error.

As Penry's brief on the merits points out, the Texas legislature eventually amended its statute to conform to the dictates of *Penry I* by providing for a question specifically directed at mitigating evidence. (Pet. Br. at 6) The result -- a situation in which the *Penry I* decision is applied to every Texas capital defendant except Penry -- is so blatantly unjust that one of the Opposing Briefs pays a left-handed compliment to its "emotional appeal." (JFA Br. at 14) But this amicus brief insists that the added question called for in the new Texas statute "simply is not ***required*** by the federal Constitution" (JFA Br. at 15; emphasis in original) and that Texas has chosen to give juries "even wider discretion" than *Penry I* commands. (*Id.* at 16) It is obvious, however, that the Texas legislature was not acting out of an impulse to be generous to capital defendants when it amended the statute. It was attempting to conform to the ruling of this Court. The legislative history is clear on this: It states that the "[p]urpose" of the bill is to give "effect to the Supreme Court's decision in Penry." Texas Senate, Committee on Criminal Jurisprudence, Bill Analysis, S.B. 80 C.S.S.B. 880.

Texas gave effect to the *Penry I* decision too late - too late to benefit Penry himself. The conduct of Penry's second trial was in blatant violation of *Penry I*.

II.

THE OPPOSING BRIEFS FAIL TO SHOW THAT THE ADMISSION OF THE PEEBLES REPORT WAS EITHER CORRECT UNDER *ESTELLE* V. *SMITH* OR HARMLESS ERROR

A. The Opposing Briefs Ignore the Question on Which this Court Granted Certiorari

The Petition for Certiorari that this Court granted stated the *Estelle* v. *Smith* question as follows:

> Is a psychiatrist appointed by the Court on motion of defense counsel, whose report is used as evidence for the prosecution, an "agent of the state" for purposes of the Fifth Amendment holding of *Estelle* v. *Smith*?

This question directly addresses the issue that the Court of Appeals for the Fifth Circuit and the Texas Court of Criminal Appeals decided: as the Fifth Circuit stated, the Texas court held that there was "no Fifth Amendment violation because Penry's attorney had requested the examination; thus, Dr. Peebles was acting as an agent of the defense, not of the State," and the Fifth Circuit deferred to that holding. (JA 4:1048-49)

Amazingly, in the 30 pages of argument which the Opposing Briefs devote to the *Estelle* v. *Smith* issue, there is *not*

one word that defends the lower courts' "agent of the State" rationale. The question which this Court granted certiorari to decide is mentioned in the Opposing Briefs only to criticize Penry for bringing it up: Respondent devotes a footnote to the subject, in which it states that Penry's "focus" on the issue is "entirely myopic" (Resp. Br. at 27 n.11), while one amicus asserts that Penry's discussion of this issue is "largely beside the point." (JFA Br. at 16)

It could hardly be plainer, we respectfully submit, that the "agent of the State" theory adopted by the Texas Court of Criminal Appeals, to which the Court of Appeals for the Fifth Circuit deferred, is, for the reasons Penry has already stated, either contrary to or an unreasonable application of *Estelle* v. *Smith*. (Pet. Br. at 28-32) If there were something to be said for the Texas court's holding, surely one of the four skilled advocates who authored the Opposing Briefs would say it.

B. The *Buchanan* Exception to *Estelle* v. *Smith* Does Not Apply

Abandoning the rationale of the Texas courts and the Court of Appeals, all of the Opposing Briefs argue that this case is within the "rebuttal" exception to *Estelle* v. *Smith* established by *Buchanan* v. *Kentucky*, 483 U.S. 402 (1987). (Resp. Br. at 27-31; JFA Br. at 16-19; CJLA Br. at 28-30; Ala. Br. at 16 n.4) But, as Penry's brief on the merits demonstrates, *Buchanan* is inapplicable, because the report of Dr. Peebles was not a "rebuttal" to any mental status evidence that Penry presented. (Pet. Br. at 34-37) The Opposing Briefs say nothing that alters this conclusion.

The most extensive *Buchanan* arguments are made in the briefs of respondent and Justice for All, which take different approaches.[2/]

1. Respondent's Argument

Respondent initially summarizes *Buchanan* in ridiculously overbroad terms, stating, without citation to authority, that "a defendant who uses psychiatric evidence at trial waives his right to exclude other, admissible psychiatric evidence." (Resp. Br. at 27) Respondent then proceeds to misstate the record, asserting that the Peebles report rebutted the testimony of the defense psychologist, Dr. Price, and the mental health records offered by the defense. (Resp. Br. at 27-31) Respondent says that there was a dispute between Dr. Price and prosecution witnesses as to whether Penry's conduct was attributable to mental retardation and child abuse, or to an antisocial personality, and it quotes the testimony of the State's rebuttal experts as contradicting that of the defense. (Resp. Br. at 29) Tellingly, however, the State does not quote a word from the Peebles report, for the Peebles report simply does not support the prosecution's side of this debate. It does not suggest, either in words or substance, that Penry's conduct was attributable to antisocial personality disorder. On the contrary, Dr. Peebles' diagnosis and that of the defense psychologist, Dr. Price, were essentially identical; both explained that Penry's mental retardation was a contributing factor to his antisocial

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2/ The Criminal Justice Legal Foundation makes a *Buchanan* argument similar to that of Justice for All. (CJLF Br. at 28-30) The State of Alabama merely asserts that *Buchanan* is applicable. (Ala. Br. at 16 n.4)

behavior. Their descriptions of Penry's mental state are virtually interchangeable:

Peebles Report	Testimony of Dr. Price
[H]e is moderately retarded and his judgement and insight are moderately to severely impaired. He also has some antisocial features which account for him not learning by his past mistakes and making some of the same mistakes over again. (JA 1:59) A person of this sort who is moderately mentally retarded does not comprehend properly what is going on around him and frequently responds inappropriately. Another thing that is disturbing is antisocial features which he has exhibited consisting	[B]rain impairment of this type, causes the person problems in areas such as the individual, if they can control themselves, impulse control, with these things, about tolerance, it decreases that. It effects their judgment and their ability to reason. The ability to make smart decisions for themselves, and others and in general, the brain impairment can cause a certain degree of instability behavior, and indirectly, those things are some of the very things that are involved in criminal activities. (JA 2:284)

Peebles Report	Testimony of Dr. Price
of the apparent inability to love or be loved, to make lasting friends, to develop adequate interpersonal relationships, lack regret for past offenses. He also has not learned from his mistakes and is likely to continue making some of his same mistakes over again. (JA 1:60)	[T]he extent of mental retardation and brain impairment are substantial factors in the development of anti-social behavior in Johnny Paul Penry. (JA 2:414)

Thus, respondent is simply wrong in arguing that the Peebles report rebutted the testimony of the defense expert as to the cause of Penry's conduct. The only significance of the Peebles report to the State's case was as evidence of future dangerousness. As Penry's brief on the merits demonstrates, the statement in the Peebles report on that issue was not rebuttal. (Pet. Br. at 34-37)

2. Justice for All's Argument

Justice for All argues that the Peebles report was rebuttal simply by discarding the ordinary meaning of the word "rebuttal" and inventing a new one. This amicus says that Peebles' statement about Penry's dangerousness rebuts the mitigating evidence of his mental retardation because it serves "to emphasize another aspect" of Penry's retarded condition. (JFA Br. at 18) In substance, Justice for All's argument is that it constitutes "rebuttal" for the State to say: "Yes, he is retarded, and that makes him all the more dangerous." (JFA Br. at 16-19)

This logic is flawed in two ways. First, the Peebles report merely states the conclusion that Penry is dangerous -- it does not present his dangerousness as "another aspect" of his mental retardation. Secondly, *Buchanan* does not permit "rebuttal" in this indirect and attenuated form. Justice for All's definition of "rebuttal" would essentially vitiate *Estelle* v. *Smith*, for, as the Justice for All brief illustrates, there is little limit to what imaginative counsel can characterize as "rebuttal"evidence in this broad sense.

"Rebut" means, according to the American Heritage Dictionary, "to refute, esp. by offering opposing evidence or arguments." *American Heritage College Dictionary* 1139 (3d ed. 1993). In the *Buchanan* context, "rebuttal" means that, if a defendant tries to prove something using mental status evidence, the prosecution may use mental status evidence to prove the contrary. *Buchanan* itself illustrates the point: the defendant in that case sought to rely upon reports of mental health professionals to establish a defense of "extreme emotional disturbance." 483 U.S. at 408. In response, the prosecution introduced a report from a doctor who had examined the defendant and found him to behave normally and appropriately, with no extreme hostility, intact memory, no hallucinations or delusions, and no thoughts of suicide. *Buchanan*, 483 U.S. at 412 n.12. This Court held that *Estelle* v. *Smith* was not violated when the doctor's report was used "for this *limited* rebuttal purpose." 483 U.S. at 424 (emphasis added). The report in *Buchanan* was redacted to remove material that was not a rebuttal to the defendant's claims. 483 U.S. at 423 n.20.

We are aware of no case, and the Opposing Briefs cite none, where the meaning of "rebuttal" has been stretched in the way Justice for All suggests -- to make anything "rebuttal" which brings out "another aspect" of the defendant's mental

state. Indeed, in *United States* v. *Byers*, 740 F.2d 1104 (D.C. Cir. 1984) (*en banc*), a case preceding *Buchanan* and relied on in the *Buchanan* decision, the District of Columbia Circuit Court of Appeals, in an opinion by then Circuit Judge Scalia that was joined by then Circuit Judge Ginsburg, made clear that "rebuttal" was being used in its ordinary meaning, not the unprecedented one that Justice for All advances: "[o]rdinarily, the only effective rebuttal of psychiatric opinion testimony is *contradictory opinion testimony*." 740 F.2d at 1114 (emphasis added); *see also Buchanan*, 483 U.S. at 423 (citing *Byers*).[3/]

* * *

The attempt in the Opposing Briefs to fit the Peebles report within the *Buchanan* exception is an afterthought, intended to rescue the prosecution from the trial court's grievous *Estelle* v. *Smith* error. The report was not used at trial to rebut the defense case, that mental retardation was a mitigating factor, but to advance the prosecution's case that Penry would be dangerous in the future. None of the courts that have upheld Penry's conviction characterized the Peebles report

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3/ The Justice for All brief incorrectly asserts, in support of its *Buchanan* argument, that the defense expert, Dr. Price, "testified that he had relied on the [Peebles] report in forming his opinions." (JFA Br. at 18-19; *see also* Resp. Br. at 26; CJLF Br. at 28.) In fact, Dr. Price testified merely that he had relied in general on the records of Penry's mental condition maintained by the Texas Department of Mental Health and Mental Retardation. (JA 2:345-46) The Peebles report was in this collection of documents, but Dr. Price was never asked whether he relied on it specifically, and he did not refer to it in support of any of his conclusions.

as "rebuttal" -- although they did uphold the admission of other prosecution evidence as proper "rebuttal" evidence under *Buchanan*. (JA 3:764-66; JA 4:919; JA 4:1045-46) Both the Texas court and the Court of Appeals obviously recognized that the Peebles report will not fit into the *Buchanan* category. Those courts instead adopted the "agent of the State" theory articulated in their opinions -- a theory which has found no defenders in this Court.

C. The Opposing Briefs' Other Attempts To Distinguish *Estelle* v. *Smith* Are Unsuccessful

The briefs of respondent and two amici, in addition to relying on *Buchanan*, argue that *Estelle* v. *Smith* is factually distinguishable from the present case. Their approach is essentially to list facts present in *Estelle* v. *Smith* not present here. (Resp. Br. at 24-26; Ala. Br. at 10-16; CJLF Br. at 23-28) They fail to demonstrate, and sometimes make no serious effort to demonstrate, that those factual differences should change the result. They seem to imply, rather, that *Estelle* v. *Smith* should be limited to the specific facts of that case -- a holding which would amount to overruling *Estelle* v. *Smith sub silentio*.

The "distinguishing" facts on which the Opposing Briefs place most emphasis are that: (1) the examination by Dr. Peebles was requested by Penry's counsel; and (2) the Peebles examination occurred in connection with a prior offense, not the one involved in this case. Both these purported distinctions are wholly without substance.

Penry's brief on the merits demonstrates that the request of defense counsel for an examination is irrelevant for *Estelle* v. *Smith* purposes, since it neither prevented Dr. Peebles from being an "agent of the State" nor amounted to a waiver of

Penry's Fifth Amendment rights. (Pet. Br. at 28-37) None of the Opposing Briefs responds to these arguments, or attempts to support either an "agent of the State" or a "waiver" theory. Nor do they advance any other theory that would make the motion of defense counsel relevant.

It is also clearly irrelevant that Penry was in custody for an earlier and different offense when Dr. Peebles examined him. It has long been well established that Fifth Amendment protections are not "case specific": involuntary statements made in the context of one prosecution may not be used against a defendant in another. *New Jersey* v. *Portash*, 440 U.S. 450, 459 (1979) ("[A] defendant's compelled statements . . . may not be put to any testimonial use whatever against him in a criminal trial."); *Mincey* v. *Arizona*, 437 U.S. 385, 398 (1978) ("[A]ny criminal trial use against a defendant of his involuntary statement is a denial of due process of law"); *Murphy* v. *Waterfront Comm'n*, 378 U.S. 52, 94 (1964) ("The privilege can be claimed in any proceeding, be it criminal or civil, administrative or judicial, investigatory or adjudicatory, and it protects any disclosures which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be so used"). It has apparently always been assumed -- without even a need for discussion -- that this rule applies in the *Estelle* v. *Smith* context.

One example of this is *Buchanan* v. *Kentucky*, 483 U.S. 402 (1987), the case on which the Opposing Briefs rely for their "rebuttal" theory. The report at issue in *Buchanan* was prepared when Buchanan was in custody, prior to the crime involved in the *Buchanan* case, "[a]s a result of a previous arrest on a burglary charge." *Buchanan*, 483 U.S. at 409 n.9. If that fact sufficed to make *Estelle* v. *Smith* inapplicable, then the whole rebuttal analysis of *Buchanan* was unnecessary. *See also*

Granviel v. *Lynaugh*, 881 F.2d 185, 190 (5th Cir. 1989) (Fifth Amendment applied to testimony of doctor who had examined defendant "five years prior to Granviel's crime").

Not all of the Opposing Briefs seem even to argue that the factual differences they rely on between this case and *Estelle* v. *Smith* are valid distinctions. The State of Alabama and the Criminal Justice Legal Foundation seem, rather, to argue that the mere existence of factual differences is enough to preclude federal habeas corpus review, under 28 U.S.C. § 2254(d). (Ala. Br. at 7-16; CJLF Br. at 23-30) The State of Alabama specifically asks this Court to revisit its decisions in last term's two cases entitled *Williams* v. *Taylor*, 529 U.S. 362 (2000), and 529 U.S. 420 (2000), and to adopt new and more stringent tests -- the gist of which is that virtually any factual difference between a case on habeas corpus and the Supreme Court precedent relied on would require denying the writ. (Ala. Br. at 1-4) If the Court were to follow the approach suggested by the State of Alabama, it would come very close to abolishing federal habeas corpus jurisdiction.

There is, in fact, nothing in this case or in the Court's recent holdings in the *Williams* cases that calls for such major surgery. Penry has demonstrated -- and the failure of the Opposing Briefs to defend the decisions under review confirms -- that this case is "materially indistinguishable" from *Estelle* v. *Smith* or that, at best, the way in which the Texas courts applied *Estelle* to these facts was "unreasonable." Under Section 2254(d) as interpreted in *Williams* v. *Taylor*, 529 U.S. 362 (2000), the *Estelle* v. *Smith* error requires that a writ of federal habeas corpus be granted.

D. The *Estelle* v. *Smith* Error Was Not Harmless

Three of the Opposing Briefs contend that the admission of the Peebles report was at most harmless error under *Brecht* v. *Abrahamson*, 507 U.S. 619 (1993), in that it had no "substantial and injurious" effect on the verdict that sentenced Penry to death. (Resp. Br. at 31-32; JFA Br. at 19-20; CJLF Br. at 29 n.2) The prosecutor who tried this case for the State, however, obviously thought otherwise. He chose the Peebles report, out of all the other pieces of evidence in the case, for the climax of his lengthy closing argument. The jury had previously heard the key sentence in the Peebles report -- "It is my further professional opinion, that if Johnny Paul Penry were released from custody, that he would be dangerous to other persons" -- because the prosecution had seized the opportunity to read it aloud as soon as the report was admitted into evidence. (JA 2:413) The prosecutor now read it again just before the jury retired, informing the jury that Dr. Peebles "made an additional finding that was really out of the ordinary" and adding, "I have never seen this in any kind of a report." (JA 3:668) If this piece of evidence was "harmless" and not "injurious" to Penry, then the judgment of this able prosecutor was very poor.

In fact, the prosecutor judged correctly that few pieces of evidence could be more effective in producing a verdict of death. In assessing the impact of the Peebles report, it is important to remember that, under this Court's decision in *Penry I*, the jury was required to do more than simply answer yes or no to the question of whether Penry was dangerous. It was supposed to decide whether, under all the circumstances -- including the very powerful mitigating evidence of mental retardation and child abuse that Penry presented -- death was the appropriate sentence. The prosecutor well knew the best way to persuade the jury to ignore Penry's mitigating evidence: it

was to frighten the jury as much as possible with the specter of a dangerous man in their community.

Since the jury was determining, not merely *whether* Penry would be dangerous in the future, but *how much weight* to give to his dangerousness, every piece of evidence that pointed in the direction of dangerousness was significant, and not, as the Opposing Briefs suggest, merely cumulative. And, as the prosecutor recognized, the Peebles report was much more significant than most. The State had called other mental health experts to give live testimony on future dangerousness and other issues, but those witnesses were cross-examined vigorously, and their credibility may well have been damaged in the jury's eyes. *See* JA 2:490-527 (cross-examination of Dr. Quijano); JA 3:558-92 (cross-examination of Dr. Samenow). The prosecutor thus chose to rely on an expert who had not been and could not be cross-examined, and to drive home to the jury the "professional opinion" of that expert "that if Johnny Paul Penry were released from custody . . . he would be dangerous to other persons." (JA 3:668)

Moreover, Dr. Peebles' comment on Penry's dangerousness appears, on the face of his report, to have been volunteered for no apparent reason -- as though Dr. Peebles found Penry so terrifying that he could not refrain from commenting. Dr. Peebles thus appeared to the jury not as a partisan prosecution witness, but as an impartial professional motivated by civic duty. That is the point the prosecutor made in saying to the jury: "That was really out of the ordinary . . . I have never seen this in any kind of a report. He just added it." (JA 3:668)

In *Satterwhite* v. *Texas*, 486 U.S. 249 (1988), this Court held that evidence from a psychiatrist concerning future

dangerousness was not harmless error under the test set forth in *Chapman* v. *California*, 386 U.S. 18 (1967). In *Satterwhite*, a state psychiatrist (Dr. Grigson) conducted a psychiatric examination in violation of the defendant's Sixth Amendment right to counsel as set forth in *Estelle* v. *Smith*. *See* 486 U.S. at 255-56. At the penalty phase the state, having already proved that the defendant had committed a vicious murder, introduced the following further evidence of future dangerousness:

> Satterwhite had four prior convictions of crimes ranging from aggravated assault to armed robbery. Eight police officers testified that Satterwhite's reputation for being a peaceful and law-abiding citizen was bad, and Satterwhite's mother's former husband testified that Satterwhite once shot him during an argument.

486 U.S. at 259. The State also presented the expert testimony of Dr. Betty Lou Schroeder, a psychologist. *See id.* "Dr. Schroeder testified that she found Satterwhite to be a 'cunning individual' and a 'user of people,' with an inability to feel empathy or guilt. She testified that in her opinion, Satterwhite would be a continuing threat to society through acts of criminal violence." *Id.*

Dr. Grigson testified similarly; he said that Satterwhite would "present a continuing threat to society by continuing acts of violence," had "a lack of conscience" and was "as severe a sociopath as you can be." *Id.* Though there was a wealth of evidence of future dangerousness, the State chose to highlight Dr. Grigson's testimony in its closing argument. The *Satterwhite* Court, noting Dr. Grigson's "qualifications as a medical doctor" and the "powerful content of his message," *id.*, and pointing out that the prosecution "placed significant weight

on his powerful and unequivocal testimony" in closing argument, *id.* at 260, held that the *Estelle* v. *Smith* error was not harmless.

It is true that *Satterwhite* is not directly controlling here, because it applied the *Chapman* standard of harmless error, under which the prosecution must prove beyond a reasonable doubt that constitutional error did not contribute to the verdict. But *Satterwhite* was not a close case: the Court there was unanimous in rejecting the claim of harmless error. And this case is even less close than *Satterwhite*. As pointed out above, Dr. Peebles, unlike Dr. Grigson, was immune from cross-examination; and he could be, and was, presented to the jury not as a hired gun, but as an impartial professional so appalled by Penry's dangerousness that he could not refrain from speaking of it.

The record provides no basis for concluding that the Peebles report did not have a "substantial and injurious effect" on the verdict sentencing Penry to death.

CONCLUSION

For the foregoing reasons and those stated in Penry's brief on the merits, the judgment of the Court of Appeals should be reversed and Penry's death should be vacated.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JOHNNY PAUL PENRY,

Petitioner,

v.

GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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18 pp

QUESTION PRESENTED — CAPITAL CASE

1. Whether the trial court's submission to the jury of the same three "special issues" previously held to violate this defendant's constitutional rights in *Penry v. Lynaugh*, 492 U.S. 302 (1989), was inconsistent with that case and other relevant decisions of this Court.*

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* This brief does not address the second question presented in Penry's petition for certiorari.

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INTEREST OF *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit corporation with more than 10,000 member attorneys, and another 28,000 affiliate members, in all fifty states and the District of Columbia. The American Bar Association recognizes the NACDL as an affiliate organization with representation in its House of Delegates. The NACDL has appeared before this Court as *amicus curiae* on many previous occasions. *See, e.g., Slack v. McDaniel*, 529 U.S. 473 (2000); *Hohn v. United States*, 524 U.S. 236 (1998).

The NACDL was founded in 1958 to advance study and research in the field of criminal law; to disseminate and expand knowledge of the law in the area of criminal practice; and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. It aims to promote the proper administration of justice and to ensure that capital punishment is imposed only in accordance with the strict demands of the United States Constitution. Because its members and affiliates routinely represent death-eligible defendants, NACDL possesses a unique perspective on the need for clear jury instructions to ensure that constitutional mandates are fulfilled in capital cases.

This brief's scope is limited to the first question presented: the inadequacy of the jury charge at Penry's resentencing subsequent to this Court's decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*").

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[1] Both parties have consented to NACDL's appearance in this matter as *amicus curiae* in support of petitioner. No counsel for any party has authored this brief in whole or in part and no person or entity, other than *amicus curiae*, has made a monetary contribution to the preparation or submission of this brief. Sup. Ct. Rule 37.6.

SUMMARY OF ARGUMENT

In *Penry I*, this Court overturned a capital sentence imposed pursuant to a Texas statute channeling the sentencing jury's discretion through a series of three "special issues." The Texas framework, which required that jurors sentence a defendant to death upon answering affirmatively the three special issues, effectively precluded jurors from giving meaningful consideration to mitigating evidence of petitioner Penry's mental retardation and history of childhood abuse. These constituted significant "aspect[s] of [his] character or record . . . proffer[ed] as a basis for a sentence less than death," whose consideration was required by *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (footnote omitted), and subsequent cases.

But Penry's resentencing, following a retrial, did not redress the constitutional infirmities identified in *Penry I*. In the wake of *Penry I*, the Texas legislature modified its capital sentencing regime to conform to *Penry I* by requiring that, notwithstanding the three special issues, jurors must also independently consider, and take into account, *any* relevant evidence justifying a penalty less than death.[2] This statutory amendment resulting from his own case, however, came too late for Johnny Penry, who was retried before it took effect. Penry's jurors were thus presented with the *same* special issues that governed his initial sentencing. The trial judge purported to remedy the constitutional defect by issuing a supplementary jury instruction. But while the instruction purportedly allowed the jurors to "give effect and consideration" to mitigating factors, it directed them to exercise that prerogative only "at the time [they] answer[ed] the special issue[s]," and only to the extent that the mitigating evidence allowed "a negative finding . . . [with respect] to one of the special issues." This improvised

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[2] Tex. Code Crim. Proc. Ann. art. 37.071 § 2(e)(1) (Vernon 1981 & 2001 Supp.) (effective September 1, 1991).

supplementary charge, allowing the jury to consider mitigating evidence, but only as it applied to the three special issues, constituted an inadequate response to *Penry I*.

Indeed, the jury charge as a whole was hopelessly confusing, creating for the second time a reasonable likelihood that the jury would, as it did, send Penry to his death despite the presence of mitigating evidence that individual jurors may have believed justified a lesser sentence. The ambiguous instruction admitted of two interpretations: One construction required jurors to give effect to mitigating evidence, but only to the extent that such evidence invited a negative answer to a special issue; the other effectively required them to answer falsely one or more of the precise special issues by which they had sworn to abide. There is at least a "reasonable likelihood" that jurors chose the former construction, and thus failed to give Penry's mitigating evidence its constitutional due.

ARGUMENT

I. THE JURY INSTRUCTIONS AT PENRY'S RESENTENCING REPEATED THE ERRORS IDENTIFIED IN *PENRY I* BY IMPERMISSIBLY CHANNELING THE JURY'S CONSIDERATION OF PENRY'S MITIGATING EVIDENCE INTO THE SPECIAL ISSUE INQUIRIES.

The trial judge's charge failed to ensure that jurors would be able meaningfully to take into account *all* relevant mitigating evidence, as required by *Penry I* and related cases.

The charge at issue in *Penry I* limited jurors' discretion by directing them to consider three "special issues": (1) whether the defendant committed the crime "deliberately;" (2) whether there was a "probability that the defendant would commit [further] criminal acts of violence;" and (3) whether the defendant's conduct "was unreasonable in response to the provocation, if any, by the deceased." If

the jury found that the answer in each case was "yes," it was required to impose the death penalty; otherwise, it was prohibited from doing so. Tex. Code Crim. Proc. Ann. art. 37.071(b) (Vernon 1981 & Supp. 1989). Penry's original jury answered "yes" to each issue and sentenced him to death. *See Penry I*, 492 U.S. at 311. This Court held that the jury was unable to give effect to Penry's unique mitigating evidence within the special issue framework. *See id.* at 322-23 (holding that Penry's mental retardation rendered him "less able than a normal adult to control his impulses or to evaluate the consequences of his conduct," and thus permitted the conclusion that he "was less morally culpable than defendants who have no such excuse"). Accordingly, the Court vacated Penry's death sentence.

After *Penry I*, the Texas legislature itself recognized that the prevailing special issue regime was flawed. In 1991, it enacted a revised capital sentencing statute providing that, before imposing a capital sentence, jurors must be allowed to consider any relevant mitigating evidence, even if that evidence is not directly applicable to any other special issue, and to return a sentence other than death, notwithstanding their answers to the other special issues.[3] The legislature made plain its belief that the revision was necessitated by *Penry I*: The committee in which the amendment originated stated its intention to "give[] effect to the Supreme Court's decision in *Penry* [*I*]," Texas Senate Comm. on Criminal Jurisprudence, Bill Analysis on S.B. 880, at 1, and supporters in the full Texas House of Representatives believed that the shift was necessary to "bring[] the statute into line with the *Penry* requirements to allow juries to consider mitigating circumstances," House Research Organization, Texas House of Representatives, Bill Analysis on H.B. 1240, at 4 (May 6, 1991).

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[3] Tex. Code Crim. Proc. Ann. art. 37.071 § 2(e)(1) (Vernon 1981 & 2001 Supp.).

But Penry was resentenced before this amendment took effect, under the same "special issues" regime used during his first trial. The only pertinent difference was that the trial judge issued an oral instruction purportedly designed to cure the infirmities identified in *Penry I*. The following comparison of that charge and the instruction now required by Texas law illustrates just how deficient and confusing the trial judge's charge was:

TRIAL JUDGE'S ACTUAL INSTRUCTION	REVISED STATUTORY INSTRUCTION
"If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability *at the time you answer the special issue*. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, *as reflected by a negative finding to the issue under consideration*, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, *a negative finding should be given to one of the special issues*."[4]	If, "taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed," the jury may not impose a death sentence.[5]

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[4] *Penry v. State*, 903 S.W.2d 715, 765 (Tex. Crim. App. 1995) (emphases added).

[5] Tex. Code Crim. Proc. Ann. art. 37.071 § 2(e)(1) (Vernon 1981 & 2001 Supp.).

The amended Texas statute did not govern Penry's resentencing, but it forcefully confirms that the trial court's improvised modification of the special issues regime failed to remedy the constitutional defects that plagued his original sentencing. The resentencing jury was never told — as Texas law now requires — that, wholly independent of the special issues, it "could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty." *Penry I*, 492 U.S. at 328. Rather, the charge emphasized — not once, but twice — that findings regarding the mitigating evidence were to be accorded relevance *only within the context of* the special issues. The first sentence allowed consideration of such evidence only "at the time" the jury considered a special question; the second sentence permitted the jury to give effect to such evidence only by providing a negative answer to one of those questions, and only when mitigation was appropriate "as reflected by a negative finding to the issue under consideration." Thus, far from allowing the jury to consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffer[ed] as a basis for a sentence less than death," *Lockett*, 438 U.S. at 604, the resentencing instruction permitted consideration of mitigating aspects *only insofar as they permitted the jury to answer "no" to one of the three special issues*.

The judge's charge, then, failed utterly to apprise the jury of its prerogative to consider and to give effect to all mitigating evidence, even outside the context of the "special issues." This Court has long held that although the state "may structure the jury's consideration of mitigation," it must "not preclude the jury from giving effect to it." *Weeks v. Angelone*, 120 S. Ct. 727, 732 (2000); *see also Woodson v. North Carolina*, 428 U.S. 280, 303 (1976). Mitigating evidence is inherently relevant "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to

emotional or mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

The defendant's entitlement to *present* mitigating evidence is not, alone, sufficient: "The sentencer must also be *able to consider and give effect to* that evidence in imposing sentence," *Penry I*, 492 U.S. at 319 (emphasis added and citation omitted), and "*any barrier* to such consideration must . . . fall," *McKoy v. North Carolina*, 494 U.S. 433, 442 (1990) (emphasis added); *see also Buchanan v. Angelone*, 522 U.S. 269, 276 (1998) (noting the Court's "consistent concern . . . that restrictions on the jury's sentencing determination not preclude the jury from being able to give effect to mitigating evidence").[6]

Consistent with these principles, this Court could not have been clearer when it "agree[d]" with Penry's argument that "his mitigating evidence of mental retardation and childhood abuse ha[d] relevance to his moral culpability *beyond the scope of the special issues*," and that a sentencing scheme that failed to account fully for that relevant evidence necessarily violated the Eighth Amendment. *Penry I*, 492 U.S. at 322 (emphasis added).[7] This fatal defect was not

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[6] Mitigating evidence is so crucial that individual jurors must be permitted to withhold a death sentence, irrespective of whether other jurors agree as to the existence or relevance of any mitigating factor. *See McKoy*, 494 U.S. at 444.

[7] The central significance of mental retardation to all facets of a defendant's moral culpability has long been recognized:

> Many of the antisocial actions of the mental retardate stem from an impulsive reaction against the painful awareness, hammered home by frustration, failure, and humiliation, of the "cruel trick that biology has played on him." Indeed, opinions in some death penalty cases have displayed a strong sense of compassion that reflects an awareness of the mental retardate's internal suffering. To the extent that such suffering can be

cured by a supplemental charge at Penry's retrial that allowed the jury to "give effect and consideration to" mitigating factors only "in assessing the defendant's personal culpability at the time [it] answer[ed] the special issue[s]," and that permitted consideration of such evidence only to the extent it allowed "a negative finding . . . [with respect] to one of the special issues." Penry's mental retardation would not necessarily have played *any* mitigating role in the jury's "yes" or "no" response to the three special issues;[8] indeed, any mitigating role it played might well have been offset, or surmounted, by jurors' perceptions that his retardation suggested future dangerousness, and therefore constituted an *aggravating* factor. *See id.* at 324 ("[M]ental retardation . . . is . . . a two-edged sword: it may diminish [Penry's]

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proved, it undercuts the expiation justification for capital punishment and should function as a mitigating circumstance.

James S. Liebman and Michael J. Shepard, *Guiding Capital Sentencing Discretion Beyond the "Boiler Plate": Mental Disorder as a Mitigating Factor*, 66 Geo. L.J. 757, 825 (1978) (internal footnotes omitted).

Indeed, while this Court has suggested that the *Penry I* principle might not necessarily apply expansively outside the context of Penry's mental retardation, *see, e.g., Graham v. Collins*, 506 U.S. 461, 475-76 (1993); *Johnson v. Texas*, 509 U.S. 350, 369 (1993), the core holding of *Penry I* nonetheless still applies in the case of Penry himself. *See, e.g., Penry v. Johnson*, 215 F.3d 504, 515 (5th Cir. 2000) (Dennis, J., dissenting).

[8] This Court has recognized a whole panoply of mitigating factors that are only marginally relevant to the special issues of the Texas statute, but that jurors nevertheless *must* be allowed to consider and take into account. These include not only mental retardation and a history of childhood abuse, but also a defendant's troubled family history and emotional disturbance, *Eddings v. Oklahoma*, 455 U.S. 104, 107, 115 (1982), his drug or alcohol dependence, *Sumner v. Shuman*, 483 U.S. 66, 81-82 (1987), his disadvantaged economic background, *Hitchcock v. Dugger*, 481 U.S. 393, 397-98 (1987); *Brown*, 479 U.S. at 545 (O'Connor, J., concurring), and even his post-offense conduct, *Skipper v. South Carolina*, 476 U.S. 1, 4-5 (1986). None of these factors would have received adequate consideration under the jury charge at issue here.

blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future.").

II. THERE WAS A "REASONABLE LIKELIHOOD" THAT PENRY'S JURORS MISUNDERSTOOD THEIR RESPONSIBILITIES WITH RESPECT TO PENRY'S MITIGATING EVIDENCE.

The resentencing instructions at issue were unduly confusing, and there is a "reasonable likelihood" that Penry's jurors applied inaccurate — and unconstitutional — legal rules to their sentencing determination. This reasonable likelihood mandates that Penry's sentence be vacated here, just as it was in *Penry I*.

In *Boyde v. California*, 494 U.S. 370 (1990), this Court explained that a capital sentence must be overturned whenever "there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.* at 380.[9] "[A] defendant *need not* establish that the jury was *more likely than not* to have been impermissibly inhibited by the instruction . . . ." *Id.* (emphases added).[10]

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[9] This Court frequently has vacated capital sentences imposed in the face of the sentencer's misunderstanding of applicable legal standards. *See, e.g., Mills v. Maryland*, 486 U.S. 367, 376 (1988) (jurors erroneously believed that they could give effect to a mitigating factor only upon reaching unanimous agreement); *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985) (in reliance on a reviewing court's power to impose a lesser appropriate penalty, jury might erroneously have believed that it was not ultimately responsible for sentencing decision); *Eddings*, 455 U.S. at 117 (trial judge misunderstood his duty to consider all mitigating evidence in mistaken reliance on state law).

[10] The mere "*risk* that the death penalty will be imposed in spite of factors that may call for a less severe penalty" is "unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." *Penry I*, 492 U.S. at 328 (emphasis added) (internal quotation marks and citations omitted).

There is every reason to believe that Penry's jurors misunderstood their prerogative to impose a sentence less than death in response to mitigating evidence that spoke to his "moral culpability" but not to the special issues. Even in ideal circumstances, a disturbingly high proportion of lay jurors misunderstand that specific prerogative.[11] The likelihood of misunderstanding is only heightened by the limitations inherent in a special issues instruction such as that used here. A juror who found a mitigating circumstance that was not responsive to any of the three special issues could choose a life sentence only after reaching the unlikely conclusion that the instruction required him or her to answer

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11 *See, e.g.*, Jordan M. Steiker, *The Limits of Legal Language: Decisionmaking in Capital Cases*, 94 Mich. L. Rev. 2590, 2596 n.28, 2614 & n.97 (1996) (reporting findings of the Capital Jury Project that a majority of California jurors who had served in capital cases did not understand the concept of mitigation). *See also* Craig Haney, *Taking Capital Jurors Seriously*, 70 Ind. L.J. 1223, 1229 (1995) (reporting that "less than one-half of [study] subjects could provide even a partially correct definition of the term 'mitigation,' almost one-third provided definitions that bordered on being uninterpretable or incoherent, and slightly more than one subject in ten was still so mystified by the concept that he or she was unable to venture a guess about its meaning") (citing Craig Haney & Mona Lynch, *Comprehending Life and Death Matters: A Preliminary Study of California's Capital Penalty Instructions*, 18 Law & Hum. Behav. 411, 420-21 (1994)); Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Juries Understand Mitigation?*, 1995 Utah L. Rev. 1, 10-22 (cataloguing studies and anecdotal data concerning jurors' confusion about the meaning of mitigation). In one study, funded by the National Science Foundation, 31.9% of 684 capital jurors interviewed in seven states reported that they had believed, after hearing the jury instructions, that the death penalty was *required* if the evidence proved that the defendant would be dangerous in the future. *See* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L.J. 1043, 1043 n.1, 1086 & n.221, 1091 & tbl. 7 (1995); *see also* James Luginbuhl & Julie Howe, *The Capital Jury Project: Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 Ind. L.J. 1161, 1167 (1995); Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1, 6 (1993).

one of those special issues *inaccurately*, based on factors wholly beyond the issue's purview. That is, in order to give Penry's mitigating evidence its constitutional due, a juror would have to reason as follows: "I believe that the special issue in question properly would be answered in the affirmative, but that I must nonetheless answer it in the negative, because I believe that factors beyond the issue's scope render death an inappropriate punishment."

Jurors faced with a choice between this interpretation — requiring them to disregard one or more of the special issues that they have been told must govern their decision — and an alternative requiring them to give effect to mitigating evidence only to the extent that such evidence influenced the answer to a special issue, would almost certainly choose the latter. That interpretation is consistent with the remainder of the jury instructions,[12] and, to lay jurors not versed in this

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12 If anything, the very structure of the instructions in this case undermined the jury's capacity properly to understand its prerogatives. Penry's jurors were instructed to consider the special issues, and to answer in the affirmative any issue found unanimously. The jury was provided with a form on which to indicate its findings vis-à-vis those issues; with respect to each, the form allowed the jury to find either "that the answer to this Special Issue is 'Yes'" or that "at least ten (10) jurors ha[d] a reasonable doubt as to the matter inquired about in this Special Issue, [and therefore] that the answer to this Special Issue is 'No.'" The form did *not* include an option allowing the jury to answer "No" even though it actually believed that the answer was "Yes."

As this Court noted in *Beck v. Alabama*, 447 U.S. 625, 644 (1980), jurors should not be required to violate their oaths to obey the law in order to render an appropriate verdict. *See also* Randy Hertz & Robert Weisberg, *In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 Cal. L. Rev. 317, 332-33 & n. 79 (1981) ("[S]ince the Texas statute expressly limits the jury's authority at sentencing to answering 'yes' or 'no' to the three statutory questions, a jury that did give independent weight to evidence that did not address the statutory questions would be acting 'lawlessly,' *Woodson v. North Carolina*, 428 U.S. at 303, and 'disregarding the jury's instruction,' *Roberts v. Louisiana*, 428 U.S. [325,] 335 [(1976)].").

Court's death penalty jurisprudence, would appear entirely plausible. But it also "prevents the consideration of constitutionally relevant evidence." *Boyde*, 494 U.S. at 380. Penry's sentence must therefore be vacated again. The failure of the courts below to follow the teachings of *Penry I* leaves no other choice.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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IN THE

Supreme Court of the United States

JOHNNY PAUL PENRY,
Petitioner,

v.

GARY L. JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF THE AMERICAN ASSOCIATION ON MENTAL RETARDATION, THE AMERICAN PSYCHIATRIC ASSOCIATION, THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW, THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION, THE ARC, and THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE* [1]

THE AMERICAN ASSOCIATION ON MENTAL RETARDATION (AAMR), founded in 1867, is the Nation's oldest and largest interdisciplinary organization of professionals in the field of mental retardation. AAMR has appeared as *amicus curiae* before this Court in numerous cases, most recently in *University of Alabama at Birmingham v. Garrett*, No. 99-1240.

THE AMERICAN PSYCHIATRIC ASSOCIATION, with more than 40,000 members, is the Nation's largest organization of physicians specializing in psychiatry. It has participated in numerous cases in the Court. *See, e.g., Olmstead v. L.C. by Zimring*, 527 U.S. 581 (1999); *Riggins v. Nevada*, 504 U.S. 127 (1992); *Smith v. Murray*, 477 U.S. 527 (1986); *Estelle v. Smith*, 451 U.S. 454 (1981). Its members have a strong interest in preventing the impairment of proper competency examinations that is threatened by the Fifth Circuit decision in this case.

THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW (AAPL) is an organization of psychiatrists dedicated to excellence in practice, teaching, and research in forensic psychiatry. Founded in 1969, AAPL currently has approximately 2,500 members in North America and around the world.

THE AMERICAN ORTHOPSYCHIATRIC ASSOCIATION is an interdisciplinary professional organization of mental health professionals, including psychiatrists, psychologists, social workers, educators, and allied

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[1] This brief was written entirely by counsel for *amici*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief. Both parties have given written consent to the filing of this brief.

professionals concerned with the problems, causes, and treatment of mental disabilities.

THE ARC OF THE UNITED STATES (formerly the Association for Retarded Citizens of the United States), through its nearly 1,000 state and local chapters, is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million children and adults with mental retardation and their families.

THE JUDGE DAVID L. BAZELON CENTER FOR MENTAL HEALTH LAW was formed in 1972 and is the leading national legal advocate for people with mental illness and mental retardation. The Center's work is currently focused on the reform of public systems to serve individuals with mental disabilities in their communities, the provision of housing, health care and support services for the mentally ill, and protections against discrimination against the mentally ill.

SUMMARY OF THE ARGUMENT

Johnny Paul Penry is a criminal defendant with mental retardation whose death sentence was reversed by this Court in 1989. He was then retried and resentenced to death. The penalty phase of his retrial replicated the constitutional error in *Penry I*, by giving the jury a contradictory and incomprehensible instruction on mitigating evidence. But the trial court compounded its error by permitting the prosecution to base its argument for aggravation on a competence evaluation report that was protected by the Fifth Amendment.

This Court made abundantly clear in *Penry I* that a defendant's mental retardation is a mitigating factor that jurors must have an unencumbered opportunity to evaluate. Nonetheless, the trial court insisted that the penalty phase verdict be limited to the same "special questions" structure that this Court had already condemned as a vehicle for considering mental retardation. The trial court's only

concession to this Court's unambiguous ruling was to instruct the jurors that if they found the mitigating evidence of mental retardation to be persuasive, they could answer "no" to one of the special questions *even if they believed "yes" to be the truthful response*. This is hardly the unobstructed opportunity to consider mental retardation's impact on individual culpability that the Constitution and *Penry I* require.

The prosecution's argument for the penalty of death focused on its assertion of the defendant's prospective dangerousness. The centerpiece of its penalty phase case was Dr. Felix Peebles' report from an evaluation of competence to stand trial in an unrelated case thirteen years earlier. That report was introduced in evidence, referred to by other prosecution witnesses, and served as the gravamen of its closing argument. This striking misuse of a clinical evaluation of competence unconstitutionally burdens the right to be free from a criminal trial while incompetent.

Defendants cannot be tried while incompetent, and therefore counsel must be free to seek an evaluation of their present ability at the time of trial. Clinicians conducting such evaluations will, of necessity, ask questions that are quite likely to produce incriminatory statements. While it is appropriate for the prosecution to use such material in relevant rebuttal to defense arguments, it is unacceptable to use that same information against a defendant who has made no such arguments. If defendants must calculate the potential adverse use of their statements, it will surely be more difficult for clinicians to provide the courts with accurate assessments of defendants' competence. Protecting this privilege will not unfairly disadvantage the State in any way, but will assure both defendants and the courts that incompetent individuals will not face trials they do not understand and in which they cannot meaningfully participate.

ARGUMENT

I. THE TRIAL COURT'S *AD HOC* INSTRUCTION OFFERED PENRY'S JURY NO REASONABLE WAY TO EVALUATE AND GIVE APPROPRIATE WEIGHT TO THE MITIGATING SIGNIFICANCE OF HIS MENTAL RETARDATION.

In *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), this Court identified and condemned the constitutional defect inherent in the former Texas sentencing statute when a defendant presented mitigating evidence having a "double-edged" quality—such as mental retardation and the effects of serious child abuse. This Court recognized that such evidence could "diminish [the defendant's] blameworthiness for his crime even as it indicates . . . a probability that he will be dangerous in the future." *Id.* at 324. Primarily because of the fact that such evidence offered in mitigation might be considered by the jury only in *aggravation*, the Texas capital sentencing statute was held to be unconstitutional as applied. The statute's focus on three special issues did not "inform the jury that it [might] consider and give effect to mitigating evidence . . . by declining to impose the death penalty." *Id.* at 328. The former Texas special issues, therefore, could unconstitutionally preclude the jury from "expressing the view that [a particular defendant does] not deserve to be sentenced to death based upon his mitigating evidence." *Id.* at 326.

A. Following Remand from this Court, the Trial Court Gave a Bewildering Mitigation Instruction in Violation of This Court's Holding in *Penry I*.

Penry's retrial following this Court's decision in *Penry I*, 492 U.S. 302 (1989), took place prior to the enactment of the new Texas statute on the consideration of mitigating evidence in the penalty phase of capital trials. *See* Tex. Code Crim.

Proc. Ann., art. 37.071 (Vernon 1981 and Supp. 2001). Thus, the trial court was still operating under the statutory scheme condemned in *Penry I*. Rather than accept defendant's proffered instructions or fashion a jury charge that faithfully conformed to this Court's opinion in *Penry I*, the trial court merely grafted confusing and contradictory language about mitigation onto the instruction that had already been found to be unconstitutional by this Court. 492 U.S. at 322-28. The resulting instruction was a bewildering maze of contradictions.

Accompanying the constitutionally defective statutory special issues instructions, the jury was given the following instruction on the subject of mitigation:

> If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability *at the time you answer the special issue*. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, *as reflected by a negative finding to the issue under consideration*, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, *a negative finding should be given to one of the special questions*.

JA at 49. (emphasis supplied.)

The only concession the instruction made to *Penry I* was to inform the jury it could consider mitigating evidence that might lead to a conclusion that life imprisonment was a more appropriate penalty than death. However, the only means the jury was offered to give expression to that conclusion remained cabined within the answers to the special questions. Thus, in order to express its view that the defendant's mental

retardation should lead to a sentence other than the death penalty, the jury would have to attest to one of the following:

(1) as a result of mental retardation, defendant did not act deliberately; or

(2) as a result of mental retardation, defendant acted in response to provocation; or

(3) as a result of mental retardation, there was no probability that defendant would commit criminal acts of violence in the future.

Tex. Code Crim. Proc. Ann., art. 37.071 (Vernon 1981) (former); *see also* JA at 17A. This Court held in *Penry I* that mental retardation can have substantial *mitigating* effect that is completely unrelated to any of these questions.

B. Mental Retardation is a Unique Mitigating Factor in Capital Sentencing, Focusing on the Culpability Rather than the Prospective Dangerousness of the Defendant.

As this Court made clear, a defendant's mental retardation[2] is a factor in mitigation of punishment that must be available for untrammeled consideration by a jury in the penalty phase of a death penalty trial. "Because Penry was mentally retarded, however, and thus less able than a normal adult to control his impulses or to evaluate the consequences of his conduct, and because of his history of childhood abuse, that same juror could also conclude that Penry was less morally

[2] The clinical definition of mental retardation at the time of Penry's retrial remained the same as the definition noted in this Court's opinion in *Penry I*, 492 U.S. at 308 n.1. In the years since the retrial, some disability organizations have modified the definition. *See, e.g.*, American Association on Mental Retardation, *Mental Retardation: Definition, Classification, and Systems of Supports* 1 (9th ed. 1992). These modifications, while significant on issues involving the delivery of appropriate services to individuals with mental retardation, have no relevance to this case.

culpable than defendants who have no such excuse." *Penry I*, 492 U.S. 302, 322-23 (1989) (internal quotation omitted). This Court's conclusion about moral culpability is abundantly supported by the clinical literature regarding mental retardation and by the experience of mental disability professionals. *See, e.g.*, Brief of *Amici Curiae* American Association on Mental Retardation *et al.*, in *Penry I*, No. 87-6177, and sources cited therein. *See generally The Criminal Justice System and Mental Retardation: Defendants and Victims* (Ronald W. Conley, Ruth Luckasson & George N. Bouthilet eds. 1992).[3]

This Court has also explicitly recognized that mental retardation is a unique type of mitigating evidence as it relates to the former Texas statutory scheme. The singular quality of mental retardation is that its permanence could lead prosecutors to argue, and jurors to conclude, that it made the individual more likely to be dangerous while also reducing his moral culpability at the time of the offense. As this Court noted in *Johnson v. Texas*, 509 U.S. 350 (1993) with specific reference to *Penry I*:[4]

[3] The relationship between mental retardation and culpability is further evidenced by the fact that since this Court's decision in *Penry I*, eleven additional states have enacted statutes precluding the imposition of the death penalty on defendants with mental retardation. State chapters of *amici* AAMR and The Arc have been actively involved in those legislative processes. In the debates leading to the enactment of these laws (as well as the re-enactment of the Federal ban in 1994), the discussion focused exclusively on issues of culpability and the potential for miscarriage of justice. None of those legislative bodies premised their actions on a lack of future dangerousness or any other issue cognizable under the special questions in the jury instructions in *Penry II*.

[4] This Court held in *Johnson* that evidence of youth is distinguishable from evidence of mental retardation because "youth" is a temporary characteristic whose effects can be ameliorated with time, whereas mental retardation is a permanent condition which might always render a particular defendant more likely to be dangerous in the future. *See also*

> Although the evidence of the mental illness fell short of providing Penry a defense to the prosecution for his crimes, the Court held that the second special issue did not allow the jury to give mitigating effect to this evidence. Penry's condition left him unable to learn from his mistakes, and the Court reasoned that the only logical manner in which the evidence of his mental retardation could be considered within the future dangerousness inquiry was as an aggravating factor.

Id. at 369 (citation omitted); *accord Graham v. Collins*, 506 U.S. 461, 473 (1993) ("The Texas special issues permitted the jury to consider this evidence, but not necessarily in a way that would benefit the defendant. Although Penry's evidence of mental impairment and childhood abuse indeed had relevance to the 'future dangerousness' inquiry, its relevance was aggravating only.").

The holding of *Penry I* is that an individual facing the penalty of death must be provided an independent and adequate vehicle which allows the jury to fully and fairly evaluate the mitigating value of significant "double-edged" evidence, such as mental retardation. Any sentence of death that does not provide such an opportunity is constitutionally infirm and cannot stand.

The Court has emphasized, "*Penry* remains the law and must be given a fair reading." *Johnson v. Texas*, 509 U.S. 350, 369 (1993) (per Kennedy, J.). The opinions of the state and federal courts below allowing Penry's sentence of death to stand are not in any way "a fair reading" of *Penry I* and indeed are "contrary to . . . clearly established Federal Law" and "involved an unreasonable application of" this Court's rulings in *Penry I*, *Johnson*, and *Graham*. *Williams v.*

Robison v. Johnson, 151 F.3d 256, 265 (5th Cir. 1998) *cert. denied*, 526 U.S. 1100 (1999) (evidence of mental illness does not require a *Penry* instruction because mental illness, unlike mental retardation, is treatable and can go into remission).

Taylor, 120 S.Ct. 1495, 1519 (2000) (citing 28 U.S.C. § 2254(d)(1) (1994)).

C. Requiring Untruthful Answers from Jurors, Who May Have Found the Mitigating Effect of Penry's Mental Retardation to be Substantial, Violates This Court's Decision in *Penry I*.

The trial court's purported cure of the constitutional deficiency in the jury instruction identified by this Court was wholly inadequate. Jurors first were instructed to consider and answer the three special issues held inadequate in *Penry I*. In direct conflict with that instruction, the jurors were then told that if they found evidence of mental retardation and child abuse to be sufficiently mitigating to warrant a penalty other than death, they were to *change* their first presumptively "true verdict" to at least one of the three special questions. Tex. Code Crim. Proc. Ann., art. 35.22 (Vernon 1966).[5]

The extraordinary inconsistency of these instructions is evident. How were individual jurors, unschooled in the sometimes-convoluted language and procedures of the law and laboring under the emotional pressures of a capital trial, to make sense of them? The cognitive dissonance that such inconsistencies can produce in individual jurors is only magnified when the entire jury deliberates collaboratively. Must an individual juror suggest an untruthful answer to one of the questions? How is the question to be selected?

The trial court's instruction failed to satisfy the requirements of *Penry I*. First, this instruction merely told the jury to consider mitigating evidence when it answered the special issues. But the instruction did not communicate that

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[5] This statute requires Texas jurors to swear this oath: "You and each of you do solemnly swear that in the case of the State of Texas against the defendant you will a *true* verdict render according to the law and the evidence, so help you God." (emphasis supplied).

evidence which has no bearing on the special issues, or which militate in favor of affirmative answers, may nevertheless also be given effect as mitigating evidence. Second, it did not tell the jurors that they could use the defendant's mitigating evidence as a reason to answer one or more of the special issues in the negative.

The instruction simply repeated the error of *Penry I*, forcing the jury to decide the life or death issue only within the constraints of the narrow special issue inquiry. This instruction did not afford the protection *Penry I* and *Johnson* required, because it did not inform the jurors that they could impose upon Penry a sentence of life imprisonment based on his mental retardation and childhood abuse, regardless of how they believed the special issues of deliberateness and future dangerousness should be answered.

Even if the jurors fully understood the contrivance of falsely changing their answer to one or more of the three questions in order to give mitigating effect to defendant's mental retardation, it is surely unacceptable to require them to violate their oath. This Court has disapproved other sentencing schemes whose constitutionality was defended because of the supposed opportunity for jurors to "fix" a constitutional defect by violating their oaths. *Roberts v. Louisiana*, 428 U.S. 325, 334-35 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 293, 302-04 (1976). *See also Beck v. Alabama*, 447 U.S. 625, 644 (1980) (allowing jurors to convict a defendant of a lesser included noncapital crime to avoid the death penalty when he was actually guilty of a capital offense "would require the jurors to violate their oaths" and "juries should not be expected to make such lawless choices").

Further, the contradictory instructions given also preclude effective judicial review to safeguard against capricious sentencing. *See Roberts v. Louisiana*, 428 U.S. at 335; *United States v. Sparf*, 156 U.S. 51 (1895) (condemning jury

nullification instructions at the guilt stage of a criminal trial because they produce arbitrary, unreviewable verdicts). Neither the constitutional rights of defendants nor respect for the rule of law is protected by approval of a scheme that depends upon jurors' willingness to give contradictory and untruthful verdicts.[6]

To contend, as *amici* do, that the instructions to Penry's jury about the consideration of mitigating evidence are fatally flawed is not to leave the trial judge without constitutionally acceptable options. Responding to the clear holding of this Court, the trial judge could easily have added a fourth special issue question on mitigation, or instructed the jury that it could return a verdict for life imprisonment notwithstanding truthful answers to the statutory questions. This is effectively what the Texas Legislature has required in modifying the statute, and the same constitutional options were open to the trial court in response to this Court's clear directive.[7] The

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[6] Indeed, if a false answer to one of the special questions is the only "vehicle" with which the jury can consider mitigating evidence of mental retardation, then it is a stolen vehicle. The Fifth Circuit had earlier suggested that the type of instruction presented to Penry's jury does not satisfy the requirements of *Penry I* because

> the jury would certainly be confused by instructions that seem to be allowing a "no" answer even when the question itself called for a "yes" answer. And if the latter should be given, modifying the plain meaning of the question, and if the jury answers "yes," how are we to know that the jury actually considered and rejected all evidence mitigating against the death penalty rather than gave its honest answer to the question asked.

Graham v. Collins, 896 F.2d 893, 896-897 n.3 (5th Cir. 1990) *rev'd on other grounds*, 950 F.2d 1009 (5th Cir. 1992)(*en banc*), *aff'd*, 506 U.S. 461 (1993). *Amici* believe this initial lower court interpretation is consistent with this Court's holding whereas their current decision is not.

[7] At least one Texas trial court gave such a constitutionally acceptable instruction during the period between *Penry I* and the legislative amendment. *See, e.g., State v. McPherson*, 851 S.W.2d 846, 847 (Tex. Crim. App. 1993), *cert. denied*, 508 U.S. 939 (1993). *See also State v.*

judge's failure to do so manifestly violated defendant's right to an unrestricted and obstacle-free consideration of the mitigating significance of his mental retardation.

II. THE INTRODUCTION AND ADVERSE USE OF THE PEEBLES REPORT ON COMPETENCE TO STAND TRIAL AT THE PENALTY PHASE VIOLATED DEFENDANT'S FIFTH AMENDMENT RIGHTS.

As this Court held in *Estelle v. Smith*, 451 U.S. 454 (1981), pretrial mental evaluations implicate the defendant's Fifth Amendment rights. The precise ruling in *Estelle* barred use of a psychiatrist's testimony derived from a pretrial competence evaluation against a capital defendant in the absence of warnings equivalent to those required by *Miranda v. Arizona*, 384 U.S. 436 (1966). However, the constitutional principle underlying *Estelle* and *Buchanan v. Kentucky*, 483 U.S. 402 (1987), is that the prosecution may not make affirmative use[8] of disclosures made by the defendant during a pretrial evaluation of the defendant's competence, or opinions based on such disclosures, whether the evaluation was initiated by the prosecution, the defense, or the court. Such evidence may be used only on the issue of competence or to rebut claims put in issue by the defense. This principle appropriately balances the need for a complete and accurate clinical assessment of mental health issues, the constitutional rights of the defendant being evaluated, and the needs of prosecutors and courts. In the instant case, Penry's sentence of death was

Wagner, 786 P.2d 93, 99 (Or.), *cert. denied*, 498 U.S. 879 (1990) (involving "substantially identical" statute).

[8] By "affirmative use," *amici* are referring to the prosecution's use of the evidence to prove the defendant's guilt or the aggravating circumstances at a capital sentencing proceeding, rather than to prove the defendant's competence or to rebut a defense or claim in mitigation raised by the defense.

largely based on a future dangerousness evaluation, made and used in violation of *Estelle* and the Constitution.

A. The Requirement of a Defendant's Competence to Stand Trial Performs an Indispensable Function in the Criminal Justice System.

Competence to stand trial is a unique issue at the intersection of law and mental disability.[9] Preventing the trial of incompetent individuals provides important protections for the defendant while also independently serving the interests of the courts. As a result, identifying the possible incompetence of a defendant is different in kind from other inquiries that might require the expertise of mental disability professionals.

This Court has long recognized that trial of any defendant who was factually incompetent is inconsistent with the central tenets of the Constitution, and as a result, any such trial is impermissible. *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966). This is true for historical, functional, and systemic reasons. "The rule that a criminal defendant who is incompetent should not be required to stand trial has deep roots in our common-law heritage." *Medina v. California*, 505 U.S. 437, 446 (1992). Aside from its historical antecedents, the status of competence to stand trial is also "fundamental to an adversary system of justice," *Drope*, 420 U.S. at 172, because of its functional role in assuring a fair trial. Recently, this Court unanimously observed:

[9] Evaluation of competence to stand trial is the most common type of clinical assessment in the criminal justice system. *See* Thomas G. Gutheil & Paul S. Appelbaum, *Clinical Handbook of Psychiatry and the Law* 291 (3d ed. 2000); Ronald Roesch & Stephen L. Golding, *Competency to Stand Trial* (1980).

> Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's behalf or to remain silent without penalty for doing so.

Cooper v. Oklahoma, 517 U.S. 348, 354 (1996) (quoting *Riggins v. Nevada*, 504 U.S. 127, 139-140 (1992) (Kennedy, J., concurring in the judgment)).

Over and above this fundamental concern for fairness to defendants, there is also the courts' own interest in both the appearance and reality of fairness. Trial of an incompetent defendant not only runs the risk of an unjust result; it also calls into question the very legitimacy of the courts themselves as reliable administrators of the community's criminal sanction. *ABA Criminal Justice Mental Health Standards*, Standard 7-4.1, Comment at 170 (1988) (the rule serves "a broader societal interest in maintaining a certain dignity in the administration of criminal justice"); Note, "Incompetency to Stand Trial," 81 *Harv. L. Rev.* 454, 458 (1967) (the trial of an incompetent defendant "loses its character as a reasoned interaction between an individual and his community and becomes an invective against an insensible object").[10] It has also been suggested that a

[10] One commentator discussed why the competence doctrine serves societal interests in addition to protecting the defendant's interests:

> First, the doctrine serves to preserve the criminal process's moral dignity by prohibiting prosecution and conviction of defendants who lack a meaningful moral understanding of wrongdoing and punishment or the nature of criminal prosecution. Second, society also has an independent interest in the reliability of the outcomes in criminal cases, including an interest in avoiding erroneous convictions.

Richard J. Bonnie, "The Competence of Criminal Defendants: Beyond *Dusky* and *Drope*," 47 *U. Miami L. Rev.* 539, 543 (1993).

defendant's competence is indispensable to effectuate the criminal justice system's retributive rationale. Wayne R. LaFave, *Criminal Law* 355 (3d ed. 2000) ("[U]nder our theory of the criminal law it is important that the defendant know why he is being punished, a comprehension which is greatly dependent upon his understanding what occurs at trial."). *Cf. Ford v. Wainwright*, 477 U.S. 399, 421 (1986) (Powell, J., concurring in part and concurring in the judgment) (retributive force of the death penalty "depends on the defendant's awareness of the penalty's existence and purpose").

These unique characteristics of competence to stand trial are reflected in the singular manner in which it is administered under our Constitution. Although this Court has not definitively ruled on the constitutional necessity of the defense of insanity, and, in some circumstances, perhaps even the requirement of *mens rea*,[11] it has made clear that dispensing with the requirement that a defendant be competent to stand trial is not discretionary with the legislature. *Drope*, 420 U.S. at 171. Similarly, States have constitutionally acceptable options regarding the burden of persuasion in cases involving the insanity defense that they lack regarding the issue of competence. *Compare Leland v. Oregon*, 343 U.S. 790 (1952), *with Cooper v. Oklahoma*, 517 U.S. 348 (1996). And, while it is common for courts to permit mentally disabled defendants to refrain from offering a defense of insanity, it is constitutionally unacceptable to permit defense counsel to waive the requirement that defendant be competent to stand trial. *Compare ABA Criminal Justice Mental Health Standards*, Standard 7-6.3

[11] *See generally Foucha v. Louisiana*, 504 U.S. 71, 88-89 (1992) (O'Connor, J., concurring in part and concurring in the judgment); *United States v. Balint*, 258 U.S. 250 (1922); *Morisette v. United States*, 342 U.S. 246 (1952); *but see United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).

(assigning the decision about asserting a defense of insanity to defendants who are competent), *with* Standard 7-4.2(c) (requiring defense counsel to raise the competency issue whenever counsel has a good faith doubt about defendant's competence).[12]

All of these factors demonstrate that the constitutional status of the requirement that defendant be competent to stand trial is *sui generis* in our criminal justice system. As a result, the evaluations by mental disabilities professionals of possible incompetence to stand trial are different in kind from evaluations for other purposes, and should receive the most rigorous protection.

B. Adverse Use of Information Disclosed in Competence Evaluations Impairs Their Clinical Accuracy and, as a Result, Their Legal Utility.

Clinical evaluations of a defendant's competence to stand trial, as with other professional evaluations of an individual's mental condition, depend upon the clinician's ability to acquire pertinent facts. Mental disability professionals conducting such evaluations need all available relevant data, including vital information from the individual being evaluated, in order to ensure a meaningful assessment of the defendant's understanding of the charges and ability to assist counsel. *See* Thomas Grisso, *Evaluating Competencies:*

[12] Similarly, it is highly unusual, absent evidence of defendant's incompetence, to allow the prosecution to insist upon an insanity defense or to permit trial courts to assert the issue *sua sponte*, *see ABA Criminal Justice Mental Health Standards*, Standard 7-6.3(b) and accompanying commentary. By contrast, this Court has held that courts have a constitutional *obligation* to act upon their doubts about a defendant's competence to stand trial, *Drope*, 420 U.S. at 177, and the American Bar Association has recommended that prosecutors be placed under a similar requirement. *See* ABA Standard 7-4.2(b) and accompanying commentary.

Forensic Assessments and Instruments 11 (1986). This is true whether the defendant is thought to have mental illness, mental retardation, or both.[13] Assuring the accuracy of the factual basis for an assessment of competence requires a considerable level of openness and willingness to participate on the part of the defendant.

A review of the kinds of inquiries that a qualified mental disability professional should make during such an evaluation reveals that inculpatory information is likely to be disclosed in a properly conducted interview. For example, when initially assessing the general level of defendant's functioning, the evaluator may simply ask, "Can you tell me how you happened to come here?"[14] Even so basic a question may elicit a self-incriminatory response. Similarly, "Can you tell me what it is that they are accusing you of having done?"; "What do you think is most likely to happen to you when you go to court?"; and "How do you intend to plead?" may

[13] Assessment of competence to stand trial in defendants with mental retardation is a particularly sensitive clinical endeavor that is only recently being addressed in the scholarly literature. Deborah K. Cooper & Thomas Grisso, "Five Year Research Update 1991-95: Evaluations for Competence to Stand Trial," 15 *Behavioral Sciences & Law* 347, 356 (1997). Recent research confirms the particular importance of establishing rapport with defendants who have mental retardation in order to increase the likelihood of accurate clinical evaluation. Kenneth Appelbaum, "Assessment of Criminal Justice-Related Competencies in Defendants with Mental Retardation," 22 *J. Psychiatry & Law* 311, 317 (1994); Kenneth Appelbaum & Paul Appelbaum, "Criminal-Justice-Related Competencies in Defendants with Mental Retardation," 22 *J. Psychiatry & Law* 483, 486-91 (1994); Richard J. Bonnie, "The Competence of Criminal Defendants with Mental Retardation to Participate in Their Own Defense," 81 *J. Crim. L. & Criminology* 419 (1990).

[14] This and the following quoted questions are suggested inquiries for evaluators in commonly accepted assessment instruments, which are all found at Thomas G. Gutheil & Paul S. Appelbaum, *Clinical Handbook of Psychiatry and the Law* 291-294 (3d ed. 2000).

produce similar answers, particularly from unsophisticated or mentally impaired defendants.

Even more clearly, explorations of potential plea-bargaining, and the ability to comprehend its implications, are likely to elicit incriminating statements:

> I don't know what is really going to happen, but let's just say that your lawyer told you that he [or she] didn't think you stood a chance of being found innocent, but that if you pled guilty he [or she] could make a deal with the district attorney to get you off with only a suspended sentence. Could you go along with that? Why [or why not]? What do you have to gain? What do you have to lose? [15]

These and similar questions are not only commonly employed, but they also represent sound clinical practice.[16] Such a probing inquiry is what provides the clinical evaluator with the data necessary to provide the court with a full and reliable assessment of the defendant's ability to understand the charges and the trial and to assist counsel.[17]

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[15] *Id.* at 292. Both the relevance and the likelihood of such questions are magnified by this Court's ruling that the test in *Dusky v. United States*, 362 U.S. 402 (1960), is applicable to the issue of competence to enter into a plea agreement. *Godinez v. Moran*, 509 U.S. 389, 398 (1993).

[16] Such potentially incriminatory questions are not limited to defendants who have mental illness, but are comparable to evaluative techniques employed in evaluating defendants with mental retardation or dual diagnoses. *See, e.g.*, Caroline Everington, "The Competence Assessment for Standing Trial for Defendants with Mental Retardation (CAST-MR): A Validation Study," 17 *Crim. Justice & Behavior* 147 (1990).

[17] More than four decades ago, this Court made clear that an assessment of competence to stand trial necessarily involves important cognitive and functional issues and not merely whether "the defendant [is] oriented to time and place and [has] some recollection of events." *Dusky*, 362 U.S. at 402.

If the defendant is not willing to speak freely and candidly with the mental disability professional conducting the assessment, the evaluator will frequently be unable to produce a reliable assessment of the defendant's mental condition. A significant degree of trust between the client and the mental disability professional is essential to establish the kind of working relationship that permits the accurate evaluations that the criminal courts require.

In the context of mental health treatment, similar considerations have led courts,[18] legislatures,[19] and professional organizations in the field of mental disabilities [20]

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[18] This Court has recently drawn the distinction between mental health treatment and that for physical illness:

> Effective psychotherapy, by contrast, depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears. Because of the sensitive nature of the problems for which individuals consult psychotherapists, disclosure of confidential communications made during counseling sessions may cause embarrassment or disgrace. For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.

Jaffee v. Redmond, 518 U.S. 1, 10 (1996).

[19] It is this concern for candid communication that has led every state to recognize a privilege protecting the confidentiality of communications between mental disability professionals and their clients. *Id.*, 518 U.S. at 12 n.11 (1996). *See generally* John Parry & Eric Y. Drogin, *Criminal Law Handbook on Psychiatric and Psychological Evidence and Testimony* 35-44 (2000).

[20] For example, *amicus* American Psychiatric Association provides:

> Psychiatric records, including even the identification of a person as a patient, must be protected with extreme care. Confidentiality is essential to psychiatric treatment. This is based in part on the special nature of psychiatric therapy as well as the traditional ethical relationship between physician and patient. . . . Because of the sensitive and private nature of the information with which the psychiatrist deals, he/she must be circumspect in the information

to insist on strict ethical rules governing disclosure and confidentiality of information about patients.

Although the expectation of confidentiality is more limited in the context of an evaluation of competence to stand trial than is true for patients seeking treatment, in the sense that defendants know that a report will be issued, parallel considerations apply. *See* Paul S. Appelbaum, "Confidentiality in the Forensic Evaluation," 7 *Int'l J. Law & Psychiatry* 285 (1984). As in all evaluations, the subject's candor will be directly dependent on his or her expectations about the use that will be made of the information. Doubts about how the revelations might subsequently be used by prosecutors, on issues other than competence to stand trial, will surely inhibit candid and open participation in the evaluation.

If the defendant sits mute, or guardedly responds as if testifying at the penalty phase of a capital trial, or is instructed by counsel not to be forthcoming, the mental disability professional is unlikely to be able to acquire the raw materials essential to a reliable assessment. Gary B. Melton

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that he/she chooses to disclose to others about a patient. The welfare of the patient must be a continuing consideration.

American Psychiatric Association, *The Principles of Medical Ethics, with Annotations Especially Applicable to Psychiatry* 5-6 (1995). *See also* American Psychiatric Association, *Guidelines on Confidentiality*, reprinted at 144 *Am. J. Psychiatry* 1522 (1987); American Psychological Association, *Ethical Principles of Psychologists and Code of Conduct*, Principle 5.02 ("Maintaining Confidentiality"), reprinted at 47 *American Psychologist* 1597, 1606 (1992); American Academy of Psychiatry and the Law, *Ethical Guidelines for the Practice of Forensic Psychiatry* Section II, *quoted in* Gary B. Melton, *et al. Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers* 87 (2d ed. 1997); American Psychology-Law Society, *Specialty Guidelines for Forensic Psychologists*, reprinted at 15 *Law & Human Behavior* 655, 660 (1991) (also endorsed by the American Academy of Forensic Psychology).

et al., Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers 88 (2d ed. 1997). And if the professional refrains from asking probing questions for fear of uncovering facts directly relevant to other legal issues, the evaluation will be similarly impaired. As a result, the ability of courts to obtain a fair and reliable assessment of defendant's competence is greatly diminished.

C. The Crucial Nature of Competence to Stand Trial Requires Vigilant Protection of Defense Counsel's Right to Seek a Competence Evaluation.

If a defendant is indigent, the only means defense counsel may have to obtain a clinical evaluation of his competence to stand trial is to request the trial court to appoint such an expert. A central issue in this case is what conditions can be placed on defense counsel's decision to seek the appointment of such an evaluator.

Penry's counsel requested the appointment of a mental disability professional to evaluate his competence to stand trial in 1977, and Dr. Felix Peebles was appointed to conduct the examination and prepare a report on the issue of competence.[21] Defendant cooperated with this evaluation,

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[21] Dr. Peebles in 1977 was appointed by the trial court pursuant to former Tex. Code Crim. Proc. Ann., art. 46.02 (Vernon 1966), which allowed only for the appointment of a neutral court expert who was required to report to all parties and the court. *But see Ake v. Oklahoma*, 470 U.S. 68 (1985). Regarding that statute and its successors, Tex. Code Crim. Proc. Ann., arts. 46.02, Sec. 3(a) and 46.03, Sec. 3(a) (Vernon Supp. 2001), and in the wake of this Court's holding in *Ake*, the Texas Court of Criminal Appeals found that these statutes were inadequate to protect a defendant's right to confidential expert mental health assistance:

> We reject the notion that a "court's expert" necessarily fulfills the role of psychiatric assistant to the indigent accused envisioned by *Ake*. Such a "court's expert" may well serve an important function in identifying whether sanity will be a significant factor at trial. But in an adversarial trial itself, judge and jury necessarily play a

which found him to have mental retardation, but which concluded that he was competent to stand trial. Defendant did not make use of the Peebles report in his own defense, nor did he place his mental status in issue; he pleaded guilty and the case ended.

A defense counsel's right to seek an evaluation of defendant's competence cannot be burdened with evaluating the risk of the prosecution using disclosed information and clinical impressions on the subjects of guilt or punishment. Since the trial of an incompetent defendant is constitutionally unacceptable, defense counsel who has a good faith reason to doubt defendant's competence to stand trial must be unfettered in choosing to seek a clinical evaluation. In particular, counsel should not be required to calculate the likelihood that defendant might disclose self-incriminating information. Counsel concerned about what defendant might reveal to the mental disability professional would sometimes be chilled from exercising the right to seek such an evaluation. Such a chilling effect could produce substantial numbers of trials of factually incompetent defendants. *Cf. Cooper v. Oklahoma*, 517 U.S. 348, 363 (1996).

Granting the prosecution complete access to all information acquired in a competence evaluation, for use at any stage of any future criminal proceeding, renders the decision to seek an evaluation a costly one. The price exacted from defendant for exercising the right to be free from trial while incompetent is so exorbitant that it risks depriving him of the right altogether.

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passive role. In that context, "court's expert" is an oxymoron. It is the parties, not the judge, who supply the evidence from which the jury is to distill the truth.

DeFreece v. State, 848 S.W.2d 150, 159 (Tex. Crim. App.), *cert. denied*, 510 U.S. 905 (1993).

This Court has long recognized that the state may be precluded from burdening the exercise of one constitutional right by requiring the relinquishment of another. Permitting the prosecution's use of material gathered during a pretrial evaluation of competence to stand trial compels defense counsel to choose between the client's right not to be tried while incompetent and the right against self-incrimination. Absent a particularly powerful governmental interest, it is generally suspect when, as Justice Harlan wrote for the Court, "one constitutional right should not have to be surrendered in order to assert another." *Simmons v. United States*, 390 U.S. 377, 394 (1968).[22] In this case, as in *Simmons*,[23] there are no state interests that even approach that magnitude. Here, the state's only interest in using the information obtained in the competence evaluation is that it believed—correctly—that the report would have emotional force with the jury. This is hardly a sufficient justification.

D. Careful Balancing of the Diverse Interests in the Criminal Justice System is Reflected in the ABA Criminal Justice Mental Health Standards.

Amici believe that constitutional principles and sound professional practice are fully consistent regarding

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[22] *Amici* do not, of course, contend that reasonable conditions can never be placed on the exercise of constitutional rights. *See generally* Peter Westen, "Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another," 66 *Iowa L. Rev.* 741 (1981). But to be "tolerable," such conditions must be supported by particularly weighty state interests, the type of interests that are wholly absent here. *See, e.g., Lefkowitz v. Cunningham*, 431 U.S. 801, 807-08 (1977); *McIntyre v. Ohio Elections Commission*, 514 U.S. 334, 348 (1995).

[23] In *Simmons*, defendant's testimony at a suppression hearing that he owned a particular suitcase (in order to establish his standing to raise Fourth Amendment rights) was held inadmissible when used by the prosecution at trial on the issue of guilt. 390 U.S. at 394.

competence evaluations. Indeed, only a clinically sensitive interpretation of the constitutional questions involved can produce the kind of reliable evaluative information that criminal trial courts require for fair adjudications. A particularly thoughtful effort at reconciling the two perspectives is to be found in the American Bar Association's Criminal Justice Mental Health Standards. These Standards were the product of an intensive interdisciplinary collaboration over the course of three years.[24] *Amici* commend them to the Court's attention as a balanced approach to this issue, which lies at the nexus of the mental disabilities professions and the law.

The goals of the Standards that govern evaluations by mental disability professionals are (1) assuring the accuracy and reliability of the information they contain so that the interests of the trier of fact are promoted, and (2) balancing the rights of the defendant with the legitimate interests of the prosecution. Therefore, the Standards are based not only on legal principles, including those announced by this Court, but also on sound professional practices of the various disciplines of mental disability professionals. A salutary and practical feature of the Standards is that they encompass both the needs of the criminal justice system and the sound clinical judgment of experienced psychiatrists, psychologists, and other mental disability professionals.

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[24] *See* B.J. George, Jr., "The American Bar Association's Mental Health Standards: An Overview," 53 *Geo. Wash. L. Rev.* 338 (1985). Professionals from clinical and mental disability organizations were part of the deliberative process in developing the Standards. The "Related Standards" annotation after each Standard cross-references not only other ABA Standards and the Association's Rules for Professional Conduct, but also the comparable standards and guidelines of mental disability professional associations, including *amici*. *See, e.g.*, ABA Standard 7-3.2 at 73-74 ("Related Standards").

Analyzing the question posed by this case under the ABA Standards, the starting point is Standard 7-4.6(a), which provides, in relevant part,

> Any information or testimony elicited from the defendant at any hearing or examination on competence . . . , and any information derived therefrom and any testimony of experts or others based on information elicited from the defendant, should be considered privileged information and should be used only in a proceeding to determine the defendant's competence to stand trial and related treatment or habilitation issues.

Id. at 198. The Standard then creates an exception that anticipated this Court's ruling in *Buchanan v. Kentucky*, 483 U.S. 402 (1987):

> The defendant may waive use of information contained in a report evaluating competence to stand trial by using the report or parts thereof for any other purpose. The defendant's use of the evaluation report for a purpose other than a determination of competence to stand trial should be considered a waiver of any privilege of nondisclosure, and the prosecutor should be permitted to use the report or any part of the report, subject only to the applicable rules of evidence.

Id. In codifying *Estelle* and anticipating *Buchanan*, the Standard "harmonizes the conflict between the judicial system's need to compel defendant cooperation in court-ordered competency evaluations and defendant's privilege against self-incrimination." *Id.*, Comment at 199. The drafters of the Standard reached the conclusion regarding privilege not only because of this Court's holding in *Estelle*, but also because given "the nature of the techniques commonly used by qualified evaluators, a more serious infringement of self-incrimination protections may ensue than in the stationhouse interrogation severely restricted" by this

Court's holding in *Miranda v. Arizona*, 384 U.S. 436 (1966). *Id.*, Comment at 199-200. *See generally Dickerson v. United States*, 120 S.Ct. 2326 (2000). Therefore, the Standard "provides the *quid pro quo* for compelled cooperation on the part of defendants in the form of a strict prohibition against" prosecutorial use of the evaluation for any purpose other than a determination of competency. ABA Standard 7-4.6(a), Comment at 201.

But while the Standards' recognition of an evidentiary privilege for defendant is constitutionally based, its sanction for prosecutorial use in rebuttal is grounded in principles of fairness. "Only if a defendant determines to submit an evaluating professional's expert testimony or report on some issue other than present mental competence will the privilege be waived, thereby opening up the contents and evidence derived from them" to use by the State. *Id.* Comment at 201. In this way, the Standard protects the defendant from becoming the "deluded instrument" of his own conviction or execution, while protecting the State's interest in avoiding an unfair advantage to a defendant who might wish to use the report for his own purposes while denying the prosecution a similar opportunity.

The Standards throughout emphasize the singular qualities of competency evaluations and the need to prevent the affirmative use by the prosecution of information gained during such evaluations. While Part IV of the Standards solely discusses competence to stand trial, Part III addresses all pretrial evaluations and expert testimony, including those evaluations performed for other purposes in the criminal justice system. For example, Standard 7-3.2(a) provides that no statement from a mental health or mental retardation professional or information derived from such a statement or *opinion* of a clinical evaluator may be admitted into evidence except in response to the issue of current competence, in rebuttal, or if "otherwise relevant to an issue *raised by*

defendant concerning defendant's mental condition *and defendant intends to introduce the testimony of a mental health or mental retardation professional to support the defense claim on this issue.*" *Id.* at 73 (emphasis supplied). In the case at bar, neither Dr. Peebles' opinion about prospective dangerousness nor any of the testimony based on it was relevant to *any* mental condition issue or evidence that defendant offered in the 1990 trial at either the guilt or the penalty phase.

The procedures for initiating evaluative examinations of a defendant are addressed in Standard 7-3.5. Particularly pertinent to this case is the provision regarding the topics to be addressed by a single report:

> An evaluation of defendant's present mental competency *should not be combined* with an evaluation of defendant's mental condition at the time of the alleged crime, or *with an evaluation for any other purpose*, unless defendant so requests or, for good cause shown, the court so orders.

Standard 7-3.5(c) (emphasis supplied).[25] In fact, the necessity of this separation is codified in the Texas statutes which empower trial courts to order competency evaluations. *See* Tex. Code Crim. Proc., art. 46.02, sec. 3(d) (requiring "a *separate report* setting forth the examiner's observations and findings concerning . . . whether the defendant is a person

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[25] A principal reason for this provision is the likelihood that the clinical "evaluator's limited experience in conducting forensic examinations may cause the evaluator to expand the limited focus of a mental evaluation to embrace diagnostic, treatment/habilitation, *and dangerousness issues.*" Comment at 98 (emphasis supplied). Similarly, the ABA Standards address the distinctions between testimony about competency matters and future dangerousness. *See, e.g.*, Standard 7-3.9(b). This is, of course, an issue that this Court has addressed in the past, and the ABA had the benefit of the opinion in *Barefoot v. Estelle*, 463 U.S. 880 (1983) when it considered the topic.

with mental illness . . . [or] mental retardation . . . ." (emphasis supplied); Sec. (h)(i) (requiring a *separate report* for information or evaluation retarding insanity) (emphasis supplied).

But the shortcomings of joining distinct clinical issues in one report initially used to determine Penry's competence to stand trial for rape in 1977 would not have created a constitutional issue had the report not been used affirmatively by the prosecution at Penry's murder trial *thirteen years later*.

E. The Right to Seek a Competence Evaluation Cannot Be Burdened By Concern About Its Subsequent Adverse Use.

This Court has already visited the issue of the inappropriate use of clinical evaluations in capital cases. In *Estelle*, 451 U.S. 454 (1981), the prosecution in the penalty phase of a capital case produced testimony from a psychiatrist who had conducted an evaluation of defendant's competence to stand trial. The Court made clear that defendant could not be made "the deluded instrument of his own execution," *id.* at 462, through testimony from an evaluator who had given no warning of the use to which the information would be put. The Fifth Amendment was held to protect statements and conclusions derived from such an interview.[26] Noting that "the Fifth Amendment privilege is as broad as the mischief against which it seeks to guard," 451 U.S. at 467 (internal quotations omitted), the Court held that Smith could

> not be compelled to respond to a psychiatrist if his statements c[ould] be used against him at a capital sentencing proceeding. Because respondent did not voluntarily consent to the pretrial psychiatric examination after being informed of his right to remain silent and the possible use of his statements, the State could not rely on what he said to Dr. Grigson to establish his future dangerousness.

451 U.S. at 468.

[26] *Estelle* also relied independently upon a basis in the Sixth Amendment. 451 U.S. at 469. But since the instant case involves an evaluation from a previous criminal prosecution for another crime, claims based on the right to counsel would be precluded by this Court's ruling in *Maine v. Moulton*, 474 U.S. 159, 179-80 n.16 (1985) (Sixth Amendment right to counsel is case-specific).

The central teaching of *Estelle* is that a clinical interview, conducted for the sole purpose of evaluating defendant's competence to stand trial *and portrayed to defendant as such*, could not be transformed into an interrogation of that unwitting defendant for subsequent use to buttress the State's argument for aggravation in a capital trial.

Obviously, different considerations come into play when the defendant has raised a mental disability-based defense, entitling the prosecution to explore possible bases for rebuttal. Thus, in *Buchanan v. Kentucky*, 483 U.S. 402 (1987), the reach of *Estelle* did not extend to the evaluation of a defendant, initiated jointly with the defense for the purpose of involuntary hospitalization as a part of the "defense strategy ... to establish the 'mental status' defense of extreme emotional disturbance." 483 U.S. at 423. The *Buchanan* Court accepted the prosecution's use of the report in question "for this limited rebuttal purpose." *Id.* at 424. Thus the teaching of *Buchanan*, which is really only an elaboration of the principle announced in *Estelle*, is that while the State generally cannot make use in the penalty phase of an evaluation performed without giving adequate warning to the defendant, it is not precluded from using such a report in rebuttal to an argument made by the defense. This is nothing more than the obvious principle of basic fairness, that a defendant may not place his mental condition in question in a criminal trial and then deprive the prosecution of a meaningful opportunity to respond. *See Estelle*, 451 U.S. at 465. *Accord* ABA Standard 7-6.4, Comment at 362. A

defendant does not become the "deluded instrument" of his own conviction when he and his lawyer have decided to use mental condition as a defense.

By contrast, Penry asserted no defense based on mental disability in the case for which the Peebles report was prepared. Indeed, that case never resulted in a trial—rather, the competency finding cleared the way for resolution of the case through a plea of guilt accepted by the trial court. Therefore, the prosecution cannot contend that the defendant somehow initially "opened the door" to use of this report by the State.

Furthermore, the defense never used the fact of mental retardation *to counter the State's claim of prospective dangerousness*, as embodied in the special question. The price of making a mitigation claim based on mental retardation cannot be that the prosecution is thereby entitled to use otherwise-barred *Estelle* material to support a dangerousness claim. By introducing evidence of mitigating circumstances, the defense does not open the door to unrelated evidence in aggravation. Were the rule otherwise, defendants would be forced to choose between their Fifth Amendment right to remain silent, on the one hand, and their virtually unqualified right to present evidence in support of mitigation, on the other. *See Skipper v. South Carolina*, 476 U.S. 1 (1986); *Penry I*, 492 U.S. at 327-28.

CONCLUSION

For these reasons, *amici* urge reversal of the judgment of the Court of Appeals.

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SUPREME COURT OF THE UNITED STATES

JOHNNY PAUL PENRY,

Petitioner,

v.

GARY L. JOHNSON,
Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF *AMICI CURIAE* THE INTERNATIONAL ASSOCIATION FOR THE SCIENTIFIC STUDY OF INTELLECTUAL DISABILITIES, *et al.* IN SUPPORT OF PETITIONER

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49 pp

– AMICI CURIAE –

The International Association for the Scientific Study of Intellectual Disabilities (IASSID)

The Australian Association for the Scientific Study of Intellectual Disabilities (ASSID)

The Canadian Association for Community Living (CACL)

The British Institute of Learning Disabilities (BILD)

The Bundesvereinigung Lebenshilfe

The Cristos Stelios Foundation

The Community of Sant'egidio

European Academy of Childhood Disability (EACD)

IHC New Zealand, Inc.

Inclusion International

MENCAP: The Royal Society for Mentally Handicapped Children and Adults

P.O.S.G.A.M.E.A.

The National Association for the Mentally Handicapped of Ireland (NAMHI)

SAMS: Standards & Monitoring Services Trust

The Society of Homes for the Handicapped

Special Olympics, Inc.

The Swedish National Association for People with Mental Handicap, FUB

TASH

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INTEREST OF *AMICI CURIAE*

The International Association for the Scientific Study of Intellectual Disabilities (IASSID) is the only world-wide scientific body for the study of intellectual disabilities. Given the inherent difficulties persons with intellectual disabilities, referred to in the United States as "mental retardation," face in the cognitive areas of communication, memory and moral reasoning, IASSID strongly opposes the execution of persons with an intellectual disability.

The Australian Association for the Scientific Study of Intellectual Disabilities (ASSID) is a scientific organization which brings together those working in the field of intellectual disability and promotes the study and understanding of intellectual disability through publications, conferences, national networks, symposia and other activities.

The Canadian Association for Community Living (CACL) supports people and families affected by intellectual disabilities and helps all Canadians to play a role in making their communities more inclusive.

The British Institute of Learning Disabilities (BILD), an independent registered charity in the United Kingdom, works to promote good practice in the provision and planning of health and social care services for persons with developmental disabilities and to promote an awareness of the issues which they face as a result of their disability.

The Bundesvereinigung Lebenshilfe is a national umbrella organization with 30,000 members in Germany, representing the interests of persons with intellectual disabilities and their families.

The Cristos Stelios Foundation (Cyprus, Greece) is an umbrella non-Governmental organization providing services to persons with disabilities throughout Cyprus.

The Community of Sant'egidio. is a lay Association recognized by the Catholic Church which works in more than 60 countries

to promote improvement in the conditions of life for persons facing the challenges of disabilities and poverty. The Community has been a candidate for the Nobel Prize for peace for several years and in 1998 won the Niwano Prize for peace in Japan.

European Academy of Childhood Disability (EACD) is a non-governmental organization which is a member of the European Disability Forum and focuses especially on issues of prevention, early intervention and habilitation of persons with developmental disabilities.

IHC New Zealand,Inc. was founded 50 years ago by parents of people with intellectual disabilities and continues today as a strong community-based service organization, advocating for the rights, inclusion and welfare of all people with intellectual disabilities.

Inclusion International, one of the largest international non-governmental organizations in the field of disability, Inclusion International, formerly known as The International League of Societies for Persons with Mental Handicap, unites close to 200 local and national member associations in 115 countries. The federation works closely with the United Nations and its agencies.

MENCAP: The Royal Society for Mentally Handicapped Children and Adults works with people with intellectual disabilities in England, Wales, and Northern Ireland, providing a broad spectrum of services and ensure recognition and respect for their rights as individuals.

P.O.S.G.A.M.E.A. is a non-profit Greek federation representing more than 140 associations of parents and guardians of mentally, autistic and multiple disabilities persons.

The National Association for the Mentally Handicapped of Ireland (NAMHI) is a national umbrella group of 160 organizations working in the field of intellectual disabilities.

SAMS: Standards & Monitoring Services Trust is a national organization which works to better the lives of people with intellectual disabilities in New Zealand and is an affiliate of Inclusion International.

The Society of Homes for the Handicapped, in keeping with its vision that the rights of persons with intellectual disabilities include, above all, the right to be recognised and respected and the right to receive whatever help is necessary in order to progress at every level, human and spiritual, works with families throughout Hong Kong, China, to provide quality service for their family members with disabilities.

Special Olympics, Inc. governs the worldwide Special Olympics movement, comprises over 200 accredited Special Olympics programs in 160 nations, all 50 States, and the District of Columbia, providing sports training and athletic competition to more than one million children and adults with mental retardation, thereby giving them the chance to develop physical fitness, demonstrate courage, experience joy, and share skills and friendship with their families, other Special Olympics athletes, and their communities.

The Swedish National Association for People with Mental Handicap, FUB (in Swedish), an organization of 31,000 members, safeguards the interests of persons with mental retardation in different sectors of society, offers support to its members and arranges activities, courses, and conferences.

TASH is an international advocacy association of people with disabilities, their family members, other advocates, and people who work in the disability field. TASH has chapters throughout the USA and Canada and members from thirty-eight countries around the world. TASH's mission is to eliminate physical and social obstacles that prevent equity, diversity and quality of life.

I. SUMMARY OF ARGUMENT *

This appeal arises from the decision of the United States Court of Appeals for the Fifth Circuit to deny Petitioner a Certificate of Appealability in this § 2254 capital habeas proceeding.[1] In denying petitioner's motion, the court relied on the rule for granting federal habeas relief in petitions filed after the enactment of the Antiterrorism and Effective Death Penalty Act (AEDPA) as stated in *Miller v. Johnson*, 200 F. 3d 274, 280-81 (5th Cir. 2000): that relief may be granted if the state court decision 'was contrary to, or involved an unreasonable application of, clearly established Supreme Court precedent. That standard is met in this case where the state court unreasonably utilized the very same jury instructions in the retrial of petitioner as those found constitutionally infirm by this Court in his first trial, attempting to remedy the infirmity by adding an instruction that would require jury nullification in order to assess a sentence other than death, after finding petitioner guilty of capital murder. Petitioner's primary brief ably presents the Constitutional infirmities in these jury instructions and their adverse impact upon Petititioner. The international *Amici Curiae*, primarily disability organizations, who bring this brief for the Court's assistance in reviewing this matter, urge the Court to look beyond the narrow issue of the blatantly unconstitutional jury instructions and examine events of the past decade in the

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*Statement of Interest of *Amici Curiae* appears herein on page xvi.

[1]None of the parties or their counsel have contributed either monetarily or substantively to the preparation of this brief. Specifically, only the *Amici Curiae*, their members and their counsel have made substantive or monetary contributions to the preparation or submission of this brief. This *Amicus Curiae* brief is submitted in support of the Petitioner, Johnny Paul Penry. *Amici Curiae* Counsel have personally consulted Tommy Skaggs in the Texas Office of the Attorney General on behalf of the Respondent and Robert Smith on behalf of the Petitioner. There is no opposition to the filing of this *Amicus Curiae* brief.

light of the standard defined in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989), hereinafter referred to as *Penry I*, for support of a ban on the execution of persons with mental retardation. Such an examination must lead to the determination that the time has now come for such a ban, as the only remedy that can correct, once and for all, the inherent flaws in the administration of the death penalty that lead to its cruel and disproportionate impact upon persons with mental retardation.

In 1972 this Court found the death sentence of William Henry Furman so harsh, freakish, and arbitrary that it halted executions nationwide. *Furman v. Georgia*, 408 U.S. 238 (1972). Like *Penry I*, Furman was a man encumbered with both poverty and mental retardation. Despite attempts by the states to comply with the Court's Order in *Furman* to remedy the arbitrariness of imposing the death penalty, the disproportionate application of that terrible weight continues to fall upon men with mental retardation and histories of deprivation and abuse.

Johnny Penry is a person with mental retardation. The disabilities that define and accompany mental retardation go to the heart of the meaning of "culpability" and "mens rea." Mental retardation corresponds directly to a defendant's capacity to understand and control his behavior; his ability to comprehend instructions, rules and warnings, included but not limited to *Fifth Amendment* warnings; his ability to participate meaningfully in his own defense; the appropriateness of a particular punishment for unacceptable or unlawful behavior, and the moral blame that should reasonably be attached to that behavior.

Here, we urge relief from a sentence of death imposed in a manner which violates the minimum constitutional standard set for jury instructions in the capital case of a person with mental retardation by this Court in the landmark case involving this very defendant. *Amici Curiae* agree with the arguments of Petitioner's counsel regarding the failure of the trial court to offer the jury in the penalty phase of his retrial a reasonable

opportunity to consider the mitigating effect of his mental retardation. We, however, focus upon issues central to the interest of the *Amici Curiae* that mandate a ban upon executing persons with mental retardation because all such executions are violations of the Eighth Amendment proscription against cruel and unusual punishment.

The moral standard for the imposition of any punishment, including and especially capital punishment, is that those who best understand the legal, ethical and moral rules of a society have the greatest responsibility to obey them and live within them. Yet 28 years after *Furman* and 11 years after *Penry I*, juries continue to assign the most severe penalty, and therefore the greatest culpability to those with substantially diminished cognitive ability, education and life experience. "It is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense." (*Penry I*). "(F)ull consideration of evidence that mitigates against the death penalty is essential if the jury is to give a reasoned moral response to the defendant's background, character and crime." *Penry I*, quoting *Franklin v. Lynaugh*, 487 U.S. 164, 184 (1988), quoting *California v. Brown*, 479 U.S.538, 545 (1987). There can be no genuine dispute that the nullification instruction given the jury in the Petitioner's retrial prevented that jury from giving a "reasoned moral response" to Petitioner's "background, character and crime."

Johnny Penry, a man compromised by a history of horrifying daily abuse beginning in infancy and with an IQ of 54, may have had some rudimentary sense that what he did was wrong; but what is the measure of his culpability? Sorting through the world's array of murderers, a rational positioning of Penry's culpability among his felonious peers would place him near the lowest in ability to plan, to form an intent. A

comparison of his capacity for cunning with others convicted of capital murder would find him among the lowest in cognitive rank. Yet Johnny Penry is a member of that minority of less than 1% of the individuals found guilty of capital murder who were sentenced to death. We would expect that small minority to be composed of the most culpable, most despicable, of felons. Instead we find many among them like Penry, persons with mental retardation, additionally scarred by the burdens of lifelong rejection, neglect and abuse. Their failures are not theirs alone; they are the failures of society. Johnny Paul Penry is an exemplar of that minority, a man the system of human services, and then the criminal justice system tragically failed. Justice Potter Stewart foreshadowed Penry's tragic fate in his opinion in *Furman*, when he wrote "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. . . [He is] among a capriciously selected random handful upon whom the sentence of death has in fact been imposed." Furman v. Georgia 408 U.S. 238,309 (1972)

Amici Curiae urge this Court to address forcefully the issues raised in this case and act now so that the constitutional and just treatment this Court ordered the State of Texas to provide to the Petitioner in his retrial may at long last be accorded him.

II. ARGUMENT

A. ALL MENTAL RETARDATION IS A SEVERE COGNITIVE DISABILITY WHOSE ESSENTIAL NATURE IS DIRECTLY RELEVANT TO THE RELIABILITY OF A DEFENDANT'S CONFESSION, HIS ABILITY TO PARTICIPATE MEANINGFULLY IN HIS DEFENSE, THE DEGREE OF CULPABILITY FOR HIS

BEHAVIOR, AND THE SEVERITY OF PENALTY APPROPRIATE FOR HIS BEHAVIOR.

1. The impact of mental retardation upon a defendant's competence taints every aspect of a criminal prosecution from the time of arrest to the imposition of the penalty imposed upon him.

Defendants with mental retardation are "often unable to understand court proceedings, assist effectively in their own defense, or understand the significance of their punishment. Significant impairments in expressive language, reading, and understanding verbal information; short attention span; and deficits in working memory are among the problems they experience. Assessment tools to help determine whether they are competent to stand trial primarily assess court-related vocabulary and information which may be 'parroted' without full understanding. These tests do not assess the fluid cognitive abilities which enable a person to understand their legal defense options. This is especially relevant to important decisional parts of legal proceedings as pleading guilty or not guilty, plea bargaining, weighing outcomes and consequences, and strategies used in testimony and cross examination." *Report of the Criminal Justice Task Force*, State of California, 1998, provided to the library, United States Supreme Court.

These limitations assume great importance in capital cases, looming large in cases like Petitioner's where a psychologist with the Texas Department of Criminal Justice, noting that Penry had the second lowest IQ on death row, testified that there was "considerable doubt as to whether he would comprehend what is really going on at trial." 11 SR 795.

2. The presence of mental retardation is directly relevant to the reliability of defendant's confession.

From their first encounter with a police officer,[2] when they waive their *Fifth Amendment* rights against self-incrimination without understanding them,[3] to the final rap of the gavel as sentence is passed, the criminal justice system frequently fails persons with mental retardation who are accused of criminal conduct. Whether due to a naive tendency to provide more incriminating information about themselves than persons of normal intelligence, a greater suggestibility and vulnerability to the influence of authority figures and the pressures of interrogation, the desire to hide their disability to avoid the stigma attached to it, or an acquiescence rooted in social and cultural adaptation to their disabilities, it is well-documented that persons with mental retardation are more likely than those of normal intelligence to give unreliable, invalid confessions, frequently and alarmingly confessing to crimes they did not commit.[4]

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[2]*See Robert* Perske. *Thoughts on the police interrogation of individuals with mental retardation*. Mental Retardation, 32(5), 377-380 (1994).

[3]*See* S. Fulero. & C. Everington. *Assessing competency to waive Miranda rights in defendants with mental retardation*. Law and Human Behavior, 19(5), 533-543 (1995).

[4]See R.B. Edgerton, *The Cloak of Competence: Years Later*. American Journal of Mental Deficiency. 80, 485-497 (1967); G.H. Gudjonsson, *A new scale of interrogative suggestibility*. Personality and Individual Differences, 5, 303-314 (1984); G.H. Gudjonsson, *The relationship of intellectual skills to suggestibility, compliance, and acquiescence*. Personality and Individual Differences, 11, 227-231 (1990); G.H. Gudjonsson, *The Psychology of Interrogations, Confessions, and Testimony*. (1992); L. Heal, & C. Sigelman, *Response*

(continued...)

The vulnerability of people with mental retardation to the inherently coercive environment of police interrogation is particularly evident when they respond to "yes - no" questions. They often try to answer questions they do not understand, giving misleading and inaccurate information. This problem has been well-documented in scientific literature,[5] as well as in case law. In the case of *State v. Moore*, 364 S.E. 2d 648, 652-56 (1988) the North Carolina Supreme Court held that a series of "yes, sir" answers did not mean the same thing when spoken by a person with mental retardation as when spoken by a person of normal intelligence,[6] and in *Monroe v. United States*, 463 F.2d

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[4](...continued)
Biases in Interviews of Individuals with Limited Mental Ability. Journal of Intellectual Disability Research, 39(4), 331-340 (1995); R.A. Leo & R.J. Ofshe, *The Consequences of false confessions: Deprivations of liberty and miscarriages of justice in the age of psychological interrogation*. Journal of Criminal Law and Criminology (1997); S. Kassin, *The Psychology of Confession Evidence*. American Psychologist, 52(3), 221-233 (1997); C.K. Sigelman, E.C. Budd, C.L. Spanhel & C.J. Schoenrock, *When in doubt, say yes: Acquiescence in interviews with mentally retarded persons*, Mental Retardation, 19, 53-58 (1981); Robert Perske, *Thoughts on the police interrogation of individuals with mental retardation*. Mental Retardation, 32(5), 377-380 (1994). *See also Sims v. Georgia*, 389 U.S. 404 (1967); *Reck v. Pate*, 367 U.S. 433 (1961); and *Culombe v. Connecticut*, 367 U.S. 568 (1961) (mental retardation a significant factor in finding a confession was involuntary and unreliable).

[5]*See* James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 George Washington Law Review 414, 425-428 (1985); Rosen, et al., *Investigating the Phenomenon of Acquiescence in the Handicapped: A Theoretical Model, Test Development and Normative Data*, 20 Brit. J. Mental Subnormality 58, 58-68 (1974); and S. Simpson, *Confessions and the Mentally Retarded Capital Defendant: Cheating to Lose*, Capital Defense Digest, Vol. 6, No. 2, p. 30 (1993).

[6]*See also State v. Ives*, 648 A.2d 129, 133 (Vt. 1994); *Yeatts v.*

(continued...)

1032 (5th Cir. 1972), responses of this type were found insufficient to constitute a valid waiver of rights even when the defendant's attorney was present.

3. Mental retardation diminishes the degree of culpability for criminal behavior.

In no case does an individual with mental retardation have that minimal level of cognitive functioning necessary for logical and moral reasoning sufficient to satisfy the requirements of the Eighth Amendment in capital cases. Although an offender with mental retardation may be aware that his behavior is unlawful, his knowledge and awareness of the degree of wrongfulness in his acts is less than that of a person of normal intelligence. Research shows, for example, that though these defendants may acknowledge that killing or other crimes are wrong, they have great difficulty in explaining *why* they are wrong. Dr. George Baroff relates the attempted explanation by a defendant with mental retardation who, while acknowledging from the witness stand that the rape of an 87-year old woman was "wrong," could not explain why. Pressed for an explanation, he admitted that he had not received "permission." Pressed further, he blurted out, "Maybe it's against her religion!" George Baroff, *Why is Mental Retardation Mitigating?*, The Champion, Vol. XXII, No. 7, 33-35 (1998).[7] This transparent lack of understanding of the nature of criminality illustrates the impairments inherent in the very definition of mental retardation that relate directly to culpability.

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[6](...continued)
Commonwealth, 242 Va. 121, 410 S.E.2d 254, 259 (1991).

[7]*See also* George Baroff, *Establishing mental retardation in capital cases: A potential matter of life and death.* Mental Retardation, 29(6), 343-349 (1991); J. Blume and D. Bruck, *Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis*, 41 Arkansas Law Review 731 (1988).

4. The reduced culpability of the offender with mental retardation requires that the penalty for his acts must be less than that of a person with normal intelligence.

People with mental retardation should not be exempt from prosecution, nor should their disability be considered as a reason or excuse for criminal behavior, but the cognitive limitations which necessarily reduce their culpability require that the penalties imposed be *proportionate* in order that justice be served. The construct of culpability has a direct relationship to cognitive ability. In no case is the death penalty a proportionate punishment for a person with mental retardation. As Justice Brennan's *Penry I* dissent reasoned,

> The impairment of a mentally retarded offender's reasoning abilities, control over impulsive behavior, and moral development in my view limits his or her culpability so that, whatever other punishment might be appropriate, the ultimate penalty of death is always and necessarily disproportionate to his or her blameworthiness and hence is unconstitutional." *Penry I*, 492 U.S. at 346

Since this Court's findings in *Furman*, it has been clear that the death penalty is to be reserved for the most culpable of all those convicted of capital crimes. *Zant v. Stephens*, 462 U.S. 862, 877 (1983); *Woodson v. North Carolina*, 428 U.S. 280, 295-296 & fn. 31 (1976); *Godfrey v. Georgia*, 446 U.S. 420, 427, 433 (1980); *Lowenfield v. Phelps*, 484 U.S. 231 (1988). To avoid the constitutional flaws identified in *Furman*, the states "must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983). Selection of individuals to receive the penalty is, therefore, not to be based only upon the nature of the offense, but also upon the culpability of the offender. Less than 1% of those convicted of capital crimes are sentenced to death. It defies logic that

individuals like Johnny Paul Penry, who fall into the bottom 2% of the population in cognitive abilities, in their ability to reason and plan, deserve to receive the punishment reserved for the most culpable persons elected to that minority of less than 1% who receive the harshest punishment meted out in our criminal justice system. *See* Emily Fabrycki Reed, *The Penry Penalty: Capital Punishment and Offenders with Mental Retardation*, 23 *(1993)*.

5. The societal advances that have led to greater integration of and achievements by individuals with mental retardation in their communities do not alter their cognitive disability and decreased culpability.

Over the last four decades, the efforts of the *Amici Curiae* and similar non-governmental organizations, as well as the federal and state governments, have allowed individuals with mental retardation to make enormous strides. Many, perhaps most, of the institutions in which such persons were often confined have been closed, and persons with these intellectual disabilities now live on their own in residential group homes or completely independently, hold meaningful jobs, and excel in Olympic-type sports. This Court has contributed significantly to this progress. *Olmstead* v. *L.C.*, 527 U.S. 581 (1999). These many accomplishments deserve recognition and applause by society. But no matter how impressive such progress, mental retardation has not been eliminated and cannot be cured, nor can such progress change the fact that these persons have serious cognitive disabilities and substantially diminished capacity for culpability. Justice Brennan recognized this distinction in his dissent in *Penry I*: "Though individuals, particularly those who are mildly retarded, may be quite capable of overcoming these limitations to the extent of being able to 'maintain [492 U.S. 302, 346] themselves independently or semi-independently in the community,'... nevertheless, the mentally retarded by definition

have a reduced ability to cope with and function in the everyday world."

It would be a tragic irony if four decades of social progress by people with mental retardation were used to justify their continued subjection to execution for crimes for which they do not have the minimum level of culpability almost every civilized society requires before imposing the death penalty.

B. JOHNNY PAUL PENRY'S SENTENCE OF DEATH VIOLATES THE UNITED STATES CONSTITUTION'S GUARANTEE OF DUE PROCESS AND PROHIBITION OF CRUEL AND UNUSUAL PUNISHMENT.

1. The execution of a person with mental retardation is proscribed by the Eighth Amendment as "cruel and unusual punishment" in light of the societal consensus that has evolved since this Court's opinion in this case.

More than 90 years ago, this Court recognized that the constitutional prohibition against cruel and unusual punishments is not a rigid rule, fossilized in its meaning. It "may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States* 217 U.S. 349, 378 (1910). In *Penry I*, this Court again acknowledged the role of societal consensus in determining whether or not a particular criminal penalty is "cruel and unusual." The Court cited *Ford v. Wainwright*, 477 U.S. at 408 (1986) as a case in which the standard was met and possibly exceeded in cases of insanity; but found that the required level of societal consensus had not yet been met in cases of mental retardation. At that time only two states had banned the execution of persons with mental retardation, and the majority of the Court was not persuaded by the opinion polls and resolutions by public interest organizations presented as evidence of such a consensus. The Court noted:

> The public sentiment expressed in these and other polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely. But at present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment. *Penry I*, at 335.

Even at that time, however, four Supreme Court Justices thought a societal consensus already supported a ban on executing persons with mental retardation. Since then, lower courts have also acknowledged the significance of a societal consensus in analyzing Eighth Amendment challenges to the execution of persons with mental retardation (*See* e.g., *Andrews v. Collins*, 21 F.3d 612, 632(5th Cir. 1994). The *Andrews* court found insufficient evidence at that time of a national consensus to override this Court's determination in *Penry I*, citing only three states that had prohibited such executions since this Court's opinion in 1989. Since that time the situation has changed dramatically.

2. "Evolving standards of decency," which give context and meaning to the Cruel and Unusual Punishment Clause under the Eighth Amendment, must reflect both domestic and international standards and must acknowledge the recent international consensus condemning the execution of people with mental retardation.

Since the decision by this Court more than a decade ago in *Penry I*, public sentiment has shifted sharply against continued use of the death penalty for people with mental retardation. The evolving standards of decency that invoke the Eighth Amendment's protection should reflect not only a consensus of opinion in United States jurisdictions but the testimony of the global community. By the standards of both the domestic and the international communities, the execution of people with mental

retardation must now be viewed as a constitutionally forbidden cruel and unusual punishment.

a. The Eighth Amendment standard of decency has evolved significantly in domestic law since the decision by this Court in *Penry I*.

This Court has frequently referred[8] to the "evolving standards of decency that mark the progress of a maturing society" in gauging the application of the Eighth Amendment. *Trop v. Dulles*, 356 U.S. 86, 101 (1958). When determining whether a punishment is incompatible with evolving standards of decency, the Court has looked first and primarily to "objective indicia that reflect the public attitude toward a given sanction." *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (opinion of Stewart, Powell and Stevens, JJ.) The most important "objective evidence of contemporary values is the legislation enacted by the country's legislatures." *Penry I*, 492 U.S. at 331; *Stanford v. Kentucky*, 492 U.S. 361, 367-70 (1989). Where state legislatures have reached a sufficient "degree of national consensus" in rejecting a particular punishment, *id.* at 370-371, that punishment is unconstitutional. It is clear that at some point the state legislative trend will become so compelling that it cannot be ignored. *Enmund v. Florida*, 458 U.S. 782, 797 (1982); *Coker v. Georgia*, 433 U.S. 584, 593-96 (1977); see also *Thompson v. Oklahoma*, 487 U.S. 815, 828-29 (1988).

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[8] There have been at least 37 Supreme Court cases, most of which deal with the death penalty but all of which concern the cruel and unusual punishment clause of the Eighth Amendment, which use the phrase "evolving standards of decency that mark the progress of a maturing society." James H. Wyman, *Vengeance is Whose? The Death Penalty and Cultural Relativism in International Law*, 6 Journal of Transnational Law and Policy 543, 553, n.81 (1997).

In the 12 years since this Court's decision in *Penry I*, a "national consensus" has emerged. When the Court decided *Penry I* in 1989, only two states - Georgia and Maryland - had legislation explicitly prohibiting the execution of people with mental retardation. Since that time the situation has changed dramatically. Currently, the federal government and 13 states have passed legislation[9] prohibiting the execution of people with mental retardation. Denis Keyes and William Edwards, *Mental Retardation and the Death Penalty: Current Status of Exemption Legislation*, 21 Mental and Physical Disability Law Reporter 687, 689 - 690 (1997). Of the 52 jurisdictions of the United States with the potential to impose the death penalty (the 50 states plus the District of Columbia and the federal government), 12 states and the District of Columbia ban capital punishment altogether. Thus, 25 states, plus the federal government and the District of Columbia, or 27 of the 52 possible jurisdictions - more than half - presently ban the execution of people with mental retardation. The actions of these numerous state legislatures and Congress amount to a strong "objective indicator of contemporary values" (*Penry I*, at 335) that reflects a growing national opposition to the execution of people with mental retardation.

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[9] Federal Anti-Drug Abuse Act of 1988, Pub.L. 100-690, §7001(l), 102 Stat. 4390, 21 U.S.C. §848(l) (1988 ed.); Violent Crime Control and Law Enforcement Act of 1994 18 U.S.C. §3596(c) (1994); Ark. Code Ann. §§ 5-4-618(b) (1999); Colo. Rev. Stat. §§16-9-403 (West 2000); Ga. Code Ann. §§17-7-131(j) (2000); Ind. Code Ann. §§35-36-9-6 (West 2000); Kan. Stat. Ann. §§ 21-4623 (d) (1999); Ky. Rev. Stat. Ann. §§ 532.140 (Michie 1990); Md. Code Ann. Art. 27 §§412(g)(1)(Bender 2000); Neb. Rev. Stat. §§28-105.01(2) (2000); N.M. Stat. Ann. §§31-20A-2.1(B) (Bender 2000); N.Y. Crim. Proc. Law §§400.27(12) (West 2000); S.D. Session Law 2000, Ch. 112 (S.D.C.L. §23A-27A-2000); Tenn. Code Ann. §§39-13-203(b) (1999); Wash.Rev. Code Ann. §§10.95.040(2) (West 2000).

Even absent clear statutory mandates, courts have overturned or modified death sentences because the defendant has mental retardation.[10] Opinion polls throughout the nation continue to show that the American people are strongly opposed to executing persons with mental retardation,[11] even in states where the death penalty has the greatest public support. "Consistent opinion polling data," Dr. Stanley Herr reports, show that "Americans (even in those states that have the highest rates of execution) do not believe offenders with mental retardation should be subject to the death penalty."[12]

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[10] *See, e.g., Hadley v. Alabama*, 575 So.2d 145 (Ala.Crim. App. 1990); *Arizona v. Jimenez*, 799 P.2d 785 (Ariz. 1990); *Brown v. Florida*, 526 So.2d 903 (Fla. 1988), *cert. denied*, 488 U.S. 944, 109 S.Ct. 371 (1988).

[11] *See* Denis Keyes & William Edwards, *Mental Retardation and the Death Penalty: Current Status of Exemption Legislation*, American Bar Association (1997), in which the authors report the results of state polls in Arkansas, California, Connecticut, Florida, Georgia, Indiana, Kentucky, Louisiana, Maryland, Nebraska, New York, Oklahoma, South Carolina, and Texas demonstrating a majority of the citizenry opposes execution of persons with mental retardation. The Texas poll which showed 86% of Texans support the death penalty, also showed that 73% oppose its imposition upon persons with mental retardation. This poll was influential in persuading the Texas legislature to begin work on a state statute (SB326) banning the death penalty for mentally retarded offenders. News Release of State Senator Rodney Ellis, May 18, 1999.

[12] Stanley S. Herr, Beyond Benevolence: Legal Protection

(continued...)

In 1989 and 1997, the American Bar Association adopted a policy opposing the execution of people with mental retardation. The American Bar Association's *Criminal Justice Mental Health Standards* published in 1987, also opposes the execution of people with mental retardation and mental illness. The American Association on Mental Retardation, the oldest and largest professional organization in the field, has opposed the execution of people with mental retardation since at least 1988, *AAMR Resolution on Mental Retardation and the Death Penalty*, Board Book, at 14 (1988). In 1992, the Arc of the United States also published a policy statement on exempting people with mental retardation from the death penalty. This policy statement provides that the "presence of mental retardation by definition raises so many possibilities of miscommunication, misinformation, and inadequate defense that the imposition of the death penalty creates an unacceptable risk of a miscarriage of justice." These positions are mirror reflections of ones adopted by every other organization that has joined in this brief as an *Amicus Curiae*.

b. The evolving standard of decency defining cruel and unusual punishment must be informed by international human rights norms and actions which demonstrate a virtual unanimity in the world community against the imposition of the death penalty upon people with mental retardation.

The Eighth Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency. . ." against which we evaluate penal measures. *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)(quoting *Jackson v. Bishop*, 404 F. 2d 571, 579 (8th Cir. 1968)(Blackmun, J.)). The "civilized

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[12](...continued)
for Persons with Special Needs, in *Mental Retardation in the Year 2000*, at 279, 289 (1992).

standards" of a mature society referred to in *Estelle* can be discerned only by reference to the practices of the world community in which the United States is so important a member and participant. The customs and practices of civilized nations, as well as expressed international human rights norms, all make up the relevant "civilized standards." *Coker v. Georgia*, 433 U.S. 584, 596 n.10 (1977); *Enmund v. Florida*, 458 U.S. 782, 796 n.22 (1982); *The Paquete Habana*, 175 U.S. 677, 700 (1900). As Justice Scalia noted in this Court's judgment in *Stanford v. Kentucky*, 492 U.S. 361, 371, n.1 (1989), "[t]he practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so 'implicit in the concept of ordered liberty' that it occupies a place not merely in our mores, but, text permitting, in our Constitution as well," quoting *Thompson v. Oklahoma*, 487 U.S. 815, 868-869 (1988). While Justice Scalia suggests an Eighth Amendment prerequisite of acceptance "among our people," (Ibid), the strong shifts in state legislative and bar association action, combined with public opinion polls, demonstrate that "our people" no longer accept the death penalty for persons with mental retardation. Foreign and international practice and standards, moreover, are certainly relevant to the determination of the "civilized practices" required by the Eighth Amendment.

In addition to the growing national consensus in the United States, the general practices, customs and developments in the international community and in other countries since this Court decided *Penry I*, show overwhelming evidence of worldwide repudiation of capital punishment for people with mental retardation. The United States is one of only two countries that practice the execution of people with mental retardation. Presently, at least 108 countries prohibit by law or in practice the execution of people with mental retardation. William Edwards, *Execution of People with Mental Retardation:*

A Violation of National and International Customary International Law, 38 Mental Retardation 173, 175 (April 2000); see also, Amnesty International Website <http://www.amnesty.org/internal/death penalty/current information/abolitionist and retentionist countries> (visited January 9, 2001). Of those countries that still retain and employ the death penalty, almost none execute people with mental retardation, having simply abandoned the practice. For example, China carried out 1,769 confirmed executions in 1998 alone, three times as many as the rest of the world, yet the execution of people with mental retardation is banned, as it has been since Imperial times. See Amnesty International, *People's Republic of China, The Death Penalty in 1998*,1 (January 9, 1999); Stephen Davis, *The Death Penalty and Legal Reform in the PRC*, 1 Journal of Chinese Law 303, 307 (Fall 1987); and Tsai Tun-Ming, *The Death Penalty in Taiwan and Mainland China: Should it be Abolished*? 4 Journal of Chinese Law 173, 174 (Spring 1990).

As of 1997, no country other than the United States and Kyrgyzstan executes people with mental retardation. See Roger Hood, *The Death Penalty: The USA in World Perspective*, 6 Florida State University Journal of Transnational Law and Policy 517, 533 (1997); Report of the Secretary-General on Capital Punishment and Implementation of the Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty, UN Doc. E/CN.15/1996/19 (1996) paragraph 74; United Nations Commission on Human Rights, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. E/CN.4/1997/60 (1996) paragraphs 89, 90. Manifestly, an overwhelming international consensus on this subject now exists.

Penry I recoiled at the prospect of giving the states an unrestricted license to execute people with mental retardation: the Court acknowledged that the use of the death penalty in cases

of profound or severe mental retardation might amount to cruel and unusual punishment. *Penry I's* specific holding can be reconciled with that acknowledgment in only one of two ways: either by drawing the constitutional line explicitly in terms of degrees of mental retardation (which would present difficult practical problems) or by attempting to assimilate profound or severe mental retardation into the concept of "insanity." Significantly, neither of these ways of preserving *Penry I's* reading of the application of "evolving standards of decency" to the question of executing people with mental retardation has commended itself to the American States or to the international community in the decade since *Penry I*. To the contrary, both within the United States and globally, the unmistakable movement has been to add a prohibition against the execution of people with mental retardation to the preexisting prohibition against executing the insane, and to make the category include all people with mental retardation, not just people who are profoundly retarded.

c. Since *Penry I*, global human rights instruments, organizations and officials have increasingly called for limitation and eventual abolition of the death penalty for people with mental retardation.

The actions of the international community, and particularly of the organs charged with attending to human rights within the United Nations, can provide illuminating guidance in this Court's efforts to identify evolving standards of decency.

As early as 1971, the United Nations General Assembly adopted the Declaration on Rights of Mentally Retarded Persons. G.A. Res. 2856 (XXVI), UN Doc. A/8429 (1971). The Declaration states, in Article 6, that if a person with mental retardation is prosecuted for any offense, "he shall have the right to due process of law with full recognition being given to his degree of mental responsibility." Further, under article 7, procedures which restrict the rights of the mentally retarded

"must contain proper legal safeguards against every form of abuse."

In the 1980s, the organs of the United Nations drafted safeguards concerning the implementation of the death penalty. William Schabas, *International Norms on Execution of the Insane and the Mentally Retarded*, 4 Criminal Law Forum 95, 103 (1993). In March 1984, the United Nations Committee on Crime Prevention and Control[13] proposed a set of Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty. The safeguards call for the prohibition of the execution of "persons who have become insane." Draft Resolution VII, in Report of the Committee on Crime Prevention and Control on its Eighth Session, UN ESCOR, 8th Session, Supp. No. 6, at 19, UN Doc. E/AC.57/1984/18(1984); See also Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, ECOSOC Res. 1984/50, UN ESCOR, Supp. No. 1, at 33, UN Doc. E/1984/92 (1984). The Safeguards were subsequently endorsed by the United Nations General Assembly. United Nations General Assembly, Human Rights in the Administration of Justice, G.A. Res. 39/118, UN Doc. A/RES/39/118, 14 December 1984.

In 1988, the United Nations Committee on Crime Prevention and Control shifted its focus from prohibiting the execution of the insane - which had been accomplished throughout the world on a *de facto* basis - and brought its

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[13] This committee was an expert body tracing its origins to the International Penal and Penitentiary Commission, which in turn dated to the late nineteenth century. The committee was replaced in 1992 by the Commission on Crime Prevention and Criminal Justice, which reports to the Economic and Social Council (ECOSOC). See Roger S. Clark, *Human Rights and the U.N. Committee on Crime Prevention and Control*, 506 Annals of the American Academy of Political and Social Science 68, 69-70 (1989).

attention to bear on restraining the execution of people with mental retardation. The Committee's final resolution was adopted in 1989 by the United Nations Economic and Social Council. The Council recommended that all nations take steps to strengthen the protection of the rights of those facing the death penalty, including "[e]liminating the death penalty for persons suffering from mental retardation or extremely limited mental competence, whether at the stage of sentence or execution." Implementation of the Safeguards Guaranteeing Protection of Rights of those Facing the Death Penalty, ECOSOC Res.1989/64, UN ESCOR, 1989, Supp. No. 1, paragraph 1(d), at 51, UN Doc. E/1989/91 (1989) (adopted without a vote). In 1995 the United Nations Human Rights Committee again called for the implementation of safeguards because "there appears to have been lack of protection from the death penalty of those mentally retarded." Implementation of the Safeguards Guaranteeing Protection of the Rights of Those Facing the Death Penalty, ECOSOC Res. 1996/19, UN Doc. E/CN 15/1996/19 (1996).

The United Nations Commission on Human Rights is the leading inter-governmental body dealing with human rights issues within the United Nations. Government representatives sit on the Commission, which has varied in size. Since 1997, the United Nations Commission on Human Rights has passed resolutions on the death penalty, calling on those countries that maintain the death penalty to limit the penalty to the most serious crimes, and to impose the penalty only in compliance with treaty obligations, especially those of the International Covenant on Civil and Political Rights. UN Commission on Human Rights, Question of the Death Penalty, UN Doc. E/CN.4/1997/12, 3 April 1997; UN Doc. E/CN.4/1998/8, 3 April 1998.

In 1999, the Commission on Human Rights passed a resolution calling upon the states which maintain capital punishment "[n]ot to impose the death penalty on a person

suffering from any form of mental disorder or to execute any such person." UN Commission on Human Rights, Question of the Death Penalty, UN Doc. E/CN.4/1999/61, 23 April 1999, paragraph 3(e). Again in 2000, the Commission reiterated its position on the execution of any person with a mental disorder. UN Commission on Human Rights, Question of the Death Penalty, UN Doc. E/CN.4/2000/65, 27 April 2000, paragraph 3(e).

The U.N. Commission on Human Rights also appointed an expert to keep apprized of worldwide developments concerning capital punishment, with the specific charge to report back to the Commission on his or her findings. Since 1992, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Execution has consistently condemned the execution of people with mental retardation, with particular criticism of this practice by the United States. Commission on Human Rights, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. E/CN.4/1992/30, at paragraphs 577-578. See also, UN Doc. E/CN.4/1993/46, paragraphs 629-630, 679; UN Doc. E/CN.4/1994/7, paragraphs 620, 686-687;UN Doc. E/CN.4/1995/61, paragraphs 325, 330, 373; U.N. General Assembly, Note by the Secretary General, Annexed with a Report of the Special Rapporteur of the Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions, UN Doc. A/51/457, 7 October 1996 (reports of the execution of people with mental retardation were noted only in the United States and Kyrgyzstan. Paragraph 116); UN Doc. E/CN.4/1998/68, (after repetition of the admonition, calling on states that continue to enforce legislation permitting the execution of the mentally ill and mentally retarded to "consider the adoption of special laws to protect the mentally retarded, incorporating existing international standards."(Section VI, Recommendation 1).

In 1998, after a special mission to the United States, the Special Rapporteur submitted a report to the United Nations Commission on Human Rights which criticized the United States for executing people with mental retardation "in contravention of relevant international standards." United Nations, Report of the Special Rapporteur on Extrajudicial Summary or Arbitrary Executions, Addendum, Mission to the United States of America, UN Doc. E/CN.4/1998/68 Add.3 (1998) paragraphs 11-14, 36, 145-146 and 156. In 1999, another report of the Special Rapporteur was submitted to the United Nations Commission on Human Rights. This report relates to the monitoring of existing international standards on safeguards and restrictions governing capital punishment. The Special Rapporteur recommended that "governments that continue to enforce death penalties are urged to take immediate steps to bring their domestic legislation and practices into line with international standards prohibiting the imposition of death sentences in regard to minors and mentally ill or handicapped persons[14]." United Nations, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. E/CN/.4/1999/39 (1999) paragraph 82.

The International Covenant on Civil and Political Rights (ICCPR) is another human rights instrument which

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[14] The word "handicapped" in this context refers to persons with a mental handicap, a synonym for mental retardation. United Nations, Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Doc. E/CN/.4/1999/39 (1999) paragraph 62. See also Stanley S. Herr, *Rights and Advocacy for Retarded People* 38 (1983). The many international disability organizations who have joined in this brief as *Amici Curiae* use different terms for mental retardation. For example England uses the term "learning disability." Canada uses the word "intellectual disability," Greece uses the term "persons with disabilities" and Ireland uses the word "mentally handicapped."

contemplates the exclusion of people with mental retardation from the death penalty. GA Res. 2200 A(XXI), U.N. G.A.OR, UN Doc. A/6316 (1966). The United States ratified the ICCPR in 1992. United States Department of State, *Treaties in Force: A List of Treaties and Other International Agreements of the United States in Force on January 1, 2000*, at 392 (entered into force for the United States on September 8, 1992).

While the ICCPR does not expressly prohibit the imposition of the death penalty on people with mental retardation, Article 7 states that "[no] one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Article 6(1) of the ICCPR expressly prohibits the "arbitrary" taking of life. Various sources assist in the interpretation of the word "arbitrary", including the *travaux preparatoires*, or drafting history of the treaty. "Arbitrary[15] is defined by the drafting history to mean, *inter alia*, "without adequate determining principle; . . . not governed by any fixed rule or standard." Marc J. Bossuyt, *Guide to the "Travaux Preparatoires" of the International Covenant on Civil and Political Rights*, 123 (1987). The deprivation of life is "arbitrary" if it is "made without due regard to the rules of natural justice and due process and made in a manner contrary or in conflict with international human rights standards or international humanitarian law." William Schabas, *The Abolition of the Death Penalty in International Law* 100 (2d ed. 1997). Thus, the observation has been made that "where the condemned person is

[15] A number of human rights instruments also provide that a state may not take a person's life "arbitrarily." See, e.g., American Convention on Human Rights, which the United States has signed. 1144 U.N.T.S. 123, O.A.S.T.S. No. 36, at 1, art. 4, 1969, entered into force July 19, 1978; African Charter on Human and People's Rights, OAU Doc. CAB/LEG/67/3/rev. 5, 4 EHRR 417, 21 I.L.M. 58, art. 4.

seriously lacking in understanding, the taking of life might be considered arbitrary." John Quigley, *Criminal Law and Human Rights: Implications of the United States Ratification of the International Covenant on Civil and Political Rights*, 6 Harvard Human Rights Journal 59, 75 (1993).

In 1995 the United Nations Human Rights Committee in commenting on the United States Report on compliance with ICCPR, expressed its "regret" that the United States continues to execute people with mental retardation. United Nations, Consideration of Reports submitted by states parties under Article 40 of the Covenant: Comments of the Human Rights Committee, 53rd Session, 1413 mtg, par. 14 at 4, par 16 at 4, UN Doc. CCPR/C/79/Add. 50 (1995). As of January 5, 2001, 147 states, including the United States are parties to the International Covenant on Civil and Political Rights, making it one of the most universally ratified statements of global human rights norms. (See United Nation Treaty Collection, on Internet at <http://untreaty.un.org.> (visited January 5, 2001).) The United States should interpret its own constitutional provisions - here, the Eighth Amendment provision barring cruel and unusual punishment - in a manner which is consistent with its international treaty obligations.

Many other human rights organizations such as the Organization for Security and Co-operation in Europe[16] and the European Union have voiced their strong opposition to the

[16] Organization on Security and Co-operation in Europe, Document of the 1990 Copenhagen Meeting of the Conference on the Human Dimension of the OSCE, 5 June - 29 July, 1990. Article 17.3 states that the "participating States" (which include the U.S.) "note the restrictions and safeguards regarding the use of the death penalty which have been adopted by the international community, in particular Article 6 of the International Covenant on Civil and Political Rights."

execution of people with mental retardation. In 2000, the European Union expressed its concern, via a demarche, that the United States continues to carry out the death penalty against those who suffer from mental disorder. European Union Demarche on the Death Penalty, forwarded to the United States with an European Union Memorandum on the Death Penalty on February 25, 2000.

Taken together, the evidence of near-universal abhorrence of the death penalty for people with mental retardation is overwhelming. State practice has virtually eliminated such executions, with the conspicuous exception of the United States. Global and regional bodies and experts have expressed consistent and increasingly trenchant opposition to the execution of people with mental retardation. International disability organizations from around the globe dedicated to the promotion of human rights have insisted upon strict limitation of the death penalty, including its total elimination for people with mental retardation.

Disability organizations in the United States and throughout the world have the greatest familiarity with people with mental retardation, as well as an institutional history of understanding their needs and limitations. These organizations have condemned the practice of executing people with mental retardation through such steps as policies and resolutions[17]. Today they reinforce their condemnation of this barbaric practice through their participation as *Amici Curiae*.

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[17] For example, in 1999 the Canadian Association for Community Living passed a Resolution joining Inclusion International and others to urge United Nations members to oppose the execution of people with mental retardation (Resolution 4/99, 1999).

III. CONCLUSION

In one of his last official acts as a Supreme Court Justice, *Callins v. Collins* (1994), Justice Blackmun wrote: *"From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored – indeed, I have struggled – along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor."* To ensure fairness for those with mental retardation who stand convicted of capital crimes, this Court no longer should "tinker with the machinery of death." *Callins v. Collins*, 510 U.S. 1141, 1143 (1994). Like Justice Blackmun, many other Justices of this Court, as well as state court judges and legislators have struggled for decades to excise the sickness of disproportionality that infects the penalty like a cancer, seeming at once to have been removed by a skillful surgeon's hand, only to reappear elsewhere in the body of justice, continuing to effect its cruelty upon that class of persons the surgery was intended to help.

For example, the Court's effort to rehabilitate the death penalty through its order in *Furman v. Georgia* was a response to the appeal of William Henry Furman (*Furman v. Georgia*), a person with mental retardation whose death penalty conviction arose from his shooting through a door, not even knowing that a person stood on the other side. The Court tried again in *Penry I* to ensure fair treatment of persons with mental retardation, ruling that juries must have a reasonable opportunity to consider a defendant's mental retardation when deciding upon the penalty. The response of the State of Texas and the outcome of Penry's second trial demonstrate all too clearly how that attempt has failed another person with mental retardation.

It may well be that the system's failure is not that of government, but the failure of a society with deep historical roots of devaluing the lives of persons with mental retardation. The

enormous progress made in recent years to effect the acceptance and integration into the general community of persons with mental retardation may obscure a reservoir of prejudice and misunderstanding toward them that finds its expression in the decisions of juries that a capital defendant with mental retardation is a more likely target for death than a capital defendant of normal intelligence. We urge this Court to no longer tinker with the machinery of death where its targets are persons with mental retardation, but to acknowledge the decades of discrimination and injustice visited upon them by social perceptions of their disabilities and their worth as human beings by granting the only remedy for the constitutional infirmity that this history has wrought by reflecting the global consensus and ending the practice of executing persons with mental retardation.

Respectfully submitted,

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IN THE

Supreme Court of the United States

JOHNNY PAUL PENRY,

Petitioner,

vs.

GARY L. JOHNSON, Director, Texas Department of Criminal Justice Institutional Division,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. In a case where the Texas "special issues," which were found inadequate as applied in *Penry* v. *Lynaugh*, are supplemented with instructions to answer an issue "no" if a life sentence is the appropriate response to defendant's mitigating evidence, is the state court decision affirming the sentence contrary to or an unreasonable application of *Penry* v. *Lynaugh* and *Boyde* v. *California*?

2. Where a competency examination from an earlier, unrelated case, in which it was requested by defense counsel, is used in the penalty phase for a subsequent crime, is the state court decision finding *Estelle* v. *Smith* inapplicable contrary to clearly established Federal law?

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IN THE

Supreme Court of the United States

JOHNNY PAUL PENRY,

Petitioner,

vs.

GARY L. JOHNSON, Director, Texas Department of Criminal Justice Institutional Division,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protections of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

This case involves the proper interpretation of Congress's landmark reform of habeas corpus law in the Antiterrorism and

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1. Rule 37.6 Statement: This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

Effective Death Penalty Act of 1996 ("AEDPA"). This law, if properly implemented, will greatly reduce unnecessary delay in the enforcement of capital punishment and reduce the number of correct criminal judgments erroneously overturned on federal habeas. These changes would advance the rights of victims and society which CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

In 1977, in two separate incidents, petitioner Johnny Penry raped two women at knife-point. See J. A. 19-20. In the second incident, he demonstrated sufficient mental capacity to deceive the victim. At the request of defense counsel, Penry was examined for competency by Dr. Felix Peebles. J. A. 125. The case was resolved by plea bargain, with a sentence of five years on one count and dismissal of the other. J. A. 129-130.

On October 25, 1979, Penry raped Pamela Carpenter. J. A. 21-23. Having learned the consequences of leaving a living victim to testify, he stabbed her, J. A. 23-24, with a knife he had brought for that purpose. J. A. 21-22. Mrs. Carpenter died later that day, after describing her attacker. J. A. 873-874.

Penry's first death sentence was set aside by this Court on habeas corpus in *Penry* v. *Lynaugh*, 492 U. S. 302, 328 (1989) ("*Penry I*"), on the ground that the instructions, as applied to the case, did not provide the jury "with a vehicle for expressing its 'reasoned moral response' to [Penry's mitigating] evidence in rendering its sentencing decision."

On retrial, the defense's psychiatric expert relied on Dr. Peebles' report. J. A. 326-327. The prosecution expert relied on the same report. J. A. 456. The experts disagreed as to whether Penry was, in fact, mentally retarded. J. A. 279, 482.

The Court gave supplemental instructions on mitigating evidence and personal culpability designed to remedy the problem in *Penry I*. See J. A. 675. The jury returned "yes" answers to the special issues, and Penry was sentenced to death. The Texas Court of Criminal Appeals affirmed, after reviewing

"135 points of error," in an opinion spanning 108 pages of the Joint Appendix. Penry's case was further reviewed by the same court on habeas corpus, J. A. 863, following an evidentiary hearing and extensive findings of fact by the trial court. J. A. 795-862. The United States District Court then thoroughly reviewed Penry's claims on federal habeas. J. A. 865-1036. The Court of Appeals denied a certificate of appealability. J. A. 1037. This Court granted a writ of certiorari.

SUMMARY OF ARGUMENT

The issue of availability of relief under 28 U. S. C. § 2254(d) should be addressed as a threshold matter, before and usually in lieu of the merits of the underlying decision, to avoid advisory opinions and to further the purpose of the statute.

The state court decision is not contrary to *Penry I*, as the present case is more than materially distinguishable on both the instructions and the prosecutor's argument. The state court correctly recognized and reasonably applied *Penry I* and *Boyde* v. *California*.

The question of whether the rule of *Estelle* v. *Smith* should be extended to the facts of the present case should be analyzed under the "clearly established" element of the statute, and the analysis is essentially the same as under *Teague* v. *Lane*. The present case differs markedly from *Smith*, in that the mental examination (1) was requested by defense counsel; (2) related to a prior crime for which criminal proceedings had concluded; and (3) was relied on by the defense's own expert. Extension of *Smith* to these facts would be a new rule, and a wrong rule.

ARGUMENT

I. The AEDPA issue should be resolved first, as a "threshold matter."

Before we address the merits of the case, there is an important methodology question which has divided the circuits.

Should a court addressing an issue subject to 28 U. S. C. § 2254(d) decide whether petitioner's claim meets the criteria of that section first, or should it go to the merits of the underlying question first and only address the statutory standard if it disagrees with the state court's conclusion? Compare *Tran* v. *Lindsey*, 212 F. 3d 1143, 1154-1155 (CA9 2000), cert. denied, 148 L. Ed. 2d 274, 121 S. Ct. 340 (2000) (sometimes cited as "*Van Tran* v. *Lindsey*"), with *Bell* v. *Jarvis*, No. 98-7002 (CA4 Dec. 29, 2000) (en banc) (slip op., at 14-16) (criticizing *Tran*). The difference between the two approaches may not matter much in this individual case, but multiplied over the tens of thousands of habeas cases per year, it is important. See U. S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 1999, Table 5.70, p. 465 (2000).

The Court has addressed the order of consideration of claims in several different contexts. Resolvability of a claim on one ground may make the answering of another question unnecessary, undesirable, improper, or even illegitimate. Jurisdiction goes to the head of the line, for without jurisdiction there is no legitimate authority to decide anything else. See *Steel Co.* v. *Citizens for a Better Environment*, 523 U. S. 83, 94, 101-102 (1998). There is also a venerable rule that a case should be resolved on nonconstitutional grounds if the constitutional question, and hence potential or actual conflict with the legislative branch, can be avoided. See *Liverpool, New York, and Philadelphia S. S. Co.* v. *Commissioners of Emigration*, 113 U. S. 33, 39 (1885).

In habeas cases, the usual order is to decide "general prerequisites" such as custody, exhaustion, and procedural default first, see *Lambrix* v. *Singletary*, 520 U. S. 518, 524 (1997), although Congress has authorized an exception for the dismissal on the merits of meritless but unexhausted applications. See 28 U. S. C. § 2254(b)(2). The rule of *Teague* v. *Lane*, 489 U. S. 288 (1989) follows these determinations but precedes the underlying question. See *Lambrix*, 520 U. S., at 524; *Penry* v. *Lynaugh*, 492 U. S. 302, 329 (1989) ("threshold

matter"). The first question in the present case is where the § 2254(d) issue is to be resolved.

There is a substantial overlap between the analysis needed to resolve a § 2254(d)(1) issue and a *Teague* issue. See *Williams* v. *Taylor*, 529 U. S. 362, 412 (2000) (comparing *Teague* "old rule" with § 2254(d)(1) "clearly established"). This overlap suggests an efficiency in addressing these two issues consecutively, before the underlying question. If the claim is barred by either or both rules, there will be no need to address the "merits" of the petitioner's claim.

The practical appeal of this approach is reinforced by both jurisprudential considerations and respect for the intent of Congress. The reason why *Teague* is a threshold matter is that announcing a new rule in a case where the rule does not affect the outcome would be an advisory opinion. See *Teague*, *supra*, 489 U. S., at 316 (plurality opinion). That is, once a court decides that petitioner's proposed rule is new and does not qualify for an exception, the question of whether the rule ought to be adopted has no effect on the outcome of the case before the court. Courts have legitimate authority to make law, especially constitutional law, only in the course of deciding cases. See *Marbury* v. *Madison*, 1 Cranch (5 U. S.) 137, 177-178 (1803); *Muskrat* v. *United States*, 219 U. S. 346, 360-361 (1911); 1 R. Rotunda & J. Nowak, Treatise on Constitutional Law § 2.13(b), p. 177 (2d ed. 1999). Once the court decides under *Teague* that the petitioner would not be entitled to relief even if he were right on the "merits," its legitimate precedent-making authority ends.

In this sense, § 2254(d)(1) is the same kind of rule as *Teague*. Where it applies, it precludes collateral relief regardless of the validity or invalidity of the underlying claim. This issue, like *Teague*, should therefore be addressed as a threshold matter.

Respect for the intent of Congress and the purpose of the AEDPA also favors this approach. The central purpose of the

statute, voiced uniformly by its supporters, is to reduce the unconscionable delays in habeas corpus, particularly in capital cases. See 141 Cong. Rec. 14,734 (1995) (statement of Sen. Feinstein); *id.*, at 15,062 (statement of Sen. Hatch); *id.*, at 15,019 (statement of Sen. Specter); *id.*, at 15,036-15,037 (statement of Sen. Nickles). Specifically addressing § 2254(d), Senator Hatch, the provision's principal sponsor, noted "Federal habeas corpus proceedings have become, in effect, a second round of appeals in which convicted criminals are afforded the opportunity to *relitigate* claims already considered and rejected by the state courts." *Id.*, at 15,062, col. 2 (emphasis added); see also K. Scheidegger, Overdue Process: A Study of Federal Habeas Corpus in Capital Cases and a Proposal for Reform 27-28 (1995).

In *Williams*, Justice Stevens acknowledged that "Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law." 529 U. S., at 386 (opinion of Stevens, J.). "That acknowledgment is correct and significant to this case. It cannot be disputed that Congress viewed § 2254(d)(1) as an important means by which its goals for habeas reform would be achieved." *Id.*, at 404 (majority opinion).

For § 2254(d)(1) to achieve its purpose, it is not enough to preclude relief; it must preclude relitigation. The state's primary interest in habeas reform was not to block relief in cases where it is warranted. But see *infra*, at 13 (problem of erroneous grants of federal relief in cases correctly decided by state courts). Rather, it was to reduce the "burden of federal relitigation of state decisions . . . ." S. O'Connor, Local Control of Crime, Address to the Attorney General's Crime Summit 5 (Mar. 4. 1991), reprinted in Habeas Corpus Issues: Hearings before the House Subcommittee on Civil and Constitutional Rights, Serial No. 39, 102d Cong., 1st Sess., at 192, 197 (1991). In habeas, as in immunity, once the respondent is forced to litigate the question, most of the value of the protection is lost. Cf. *Mitchell* v. *Forsyth*, 472 U. S. 511, 526 (1985).

Determining whether another court's decision is within reason is typically much easier and faster than deciding the underlying question *de novo*. The doctrine of law of the case, as applied to decisions of coordinate courts, is analogous to § 2254(d). See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 914-916, 953 (1998). In that context, this Court admonished the courts of appeals not to "squander private and public resources." *Christianson* v. *Colt Industries Operating Corp.*, 486 U. S. 800, 818-819 (1988). Instead, once the second court finds the first court's decision "plausible, its . . . inquiry is at an end." *Id.*, at 819.

Tran offered three reasons for deciding the underlying question first. None is persuasive. First, *Tran* noted that *Weeks* v. *Angelone*, 528 U. S. 225 (2000) decided first that the state court decision was correct, and only then addressed the AEDPA limitation. See *Weeks*, at 237; *Tran*, *supra*, 212 F. 3d, at 1155. The obvious reason is that *Williams* v. *Taylor*, *supra*, was pending but not decided at the time, and decision in this order avoided the not-yet-resolved issue of the § 2254(d)(1) standard. That reason no longer applies.

The second reason was a reference to the qualified immunity cases. *Tran*, *supra*, 212 F. 3d, at 1155. *Siegert* v. *Gilley*, 500 U. S. 226, 232 (1991) decided that "determination of whether the plaintiff has asserted a violation of a constitutional right at all" first "permits courts expeditiously to weed out suits which fail the test . . . ." But see *id.*, at 235 (Kennedy, J., concurring in the judgment). Qualified immunity differs from § 2254(d) in that "clearly established" is determined at a greater level of specificity. In *Williams* v. *Taylor*, *supra*, 529 U. S., at 413-414 (opinion of O'Connor, J.), the "reasonable probability" standard for ineffective assistance was "clearly established," while in *Anderson* v. *Creighton*, 483 U. S. 635, 639-641 (1987) "probable cause" was deemed too general. See Brief for Criminal Justice Legal Foundation as *Amicus Curiae* in *Saucier* v. *Katz*, No. 99-1977, pp. 25-26 (contrasting meaning of

"clearly established" in the two contexts). The basis of *Siegert* is that the decision of a "purely legal question," *Siegert*, 500 U. S., at 232, is typically more expeditious than the case-specific inquiry needed to ascertain whether the officer's actions violated the alleged right and therefore provides the quicker path to resolution of the case. The merits of the habeas claim, in contrast, is typically not a "purely legal question." *Tran* simply ignores the underlying rationale of *Siegert*, which points in the opposite direction for application of § 2254(d).

The final reason given by *Tran* is to "provide[ ] guidance for state courts . . . ." 212 F. 3d, at 1155. In the federal courts of appeals, where most habeas cases will end, this "guidance" is not worth the delay, expense, and dubious legitimacy of writing opinions on points which do not affect the outcome. The opinions are not binding on state courts. See *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 58-59, n. 11 (1997); *id.*, at 66, n. 21; *Lockhart* v. *Fretwell*, 506 U. S. 364, 375-376 (1993) (Thomas, J., concurring). There is certainly no shortage of case law on constitutional criminal procedure. Questions bypassed on habeas can be considered in due course on direct review. See, *e.g.*, *Holland* v. *Illinois*, 493 U. S. 474, 486 (1990) (resolving issue left open in *Teague*). The federal courts of appeals "have no reason to presume state courts are in need of [their] guidance in interpreting and applying the controlling Supreme Court precedents." *Bell* v. *Jarvis*, No. 98-7002 (CA4 Dec. 29, 2000) (en banc) (slip op., at 16). *Tran*'s mandate to write pointless opinions sends an unfortunate and incorrect message that federal courts do not have enough to do. Cf. *Watt* v. *Alaska*, 451 U. S. 259, 274 (1981) (Stevens, J., concurring). It should be expressly disapproved.

As we will show in the following parts of this brief, the Texas Court of Criminal Appeals recognized the correct precedents for this case and applied them reasonably to the facts. That is sufficient to preclude relief under § 2254(d)(1). Having decided enough to determine the outcome, a habeas court should stop. There is no justification for delaying a

decision to opine on questions which do not affect the outcome, and such delay would be contrary to the purpose of Congress in enacting this statute.

II. The state court decision on the jury instruction is not "contrary to . . . clearly established Federal law, as determined by the Supreme Court . . . ."

The leading clause of 28 U. S. C. § 2254(d) establishes a general rule of claim preclusion. Unless one of the exceptions is met, a claim adjudicated on the merits in state court is not a ground for federal habeas relief. See Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 946 (1998); 141 Cong. Rec. 15,058, col. 1-2 (1995) (statement of Sen. Biden). The exception in paragraph (2) of this subsection, relating to factual findings, is not presented in this case. The exception in paragraph (1) has two clauses, which have independent meaning. See *Williams* v. *Taylor*, 529 U. S. 362, 404-405 (2000). We address the first clause in this part and the second clause in part III, *infra*.

Under the statute, relief may be granted despite the prior adjudication if the state court decision "was contrary to . . . clearly established federal law, as determined by the Supreme Court of the United States . . . ." *Williams* endorsed the Fourth Circuit's interpretation of this clause in *Green* v. *French*, 143 F. 3d 865 (1998).

> "First, a state-court decision is contrary to this Court's precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. Second, a state-court decision is also contrary to this Court's precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours." *Williams*, *supra*, 529 U. S., at 405.

A. Rule Selection.

The first part of this test refers to the state court's selection of the governing rule, as opposed to its application of the rule to the facts of the case. For example, a decision that correctly identified *Strickland* v. *Washington*, 466 U. S. 668 (1984) as the rule for ineffective assistance claims is not "contrary to" controlling law, regardless of how much a federal court might disagree with the state court's application of the rule. The latter question falls under the second clause. See *Williams*, *supra*, 529 U. S., at 406.

Petitioner apparently does not claim that the state court erred in rule selection. In his only mention of the governing statute, he invokes the "materially indistinguishable" and "unreasonable application" tests, but not the "contradicts the governing law" test. See Brief for Petitioner 12.

This is a wise concession, because the state court clearly did recognize and apply the correct controlling precedents. The defendant contended on appeal that the jury instructions on retrial failed to implement the requirement of *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) (*Penry I*). Since the additional instructions were clearly intended to do just that, see Brief for Petitioner 9, the question is whether they were susceptible to misinterpretation by the jury to a degree sufficient to warrant reversal. The controlling case for that question is *Boyde* v. *California*, 494 U. S. 370 (1990). See Brief for Petitioner 12-13.

The state court recognized and applied the correct rules. It relied on its prior opinion in *Coble* v. *State*, 871 S. W. 2d 192, 207 (Tex. Crim. App. 1993). See J. A. 782. *Coble* relied on *Fuller* v. *State*, 829 S. W. 2d 191, 209 (Tex. Crim. App. 1992). *Fuller*, in turn, correctly recognized *Penry* as the governing rule for the substantive question and *Boyde* as the governing rule for the claimed ambiguity. See *ibid.*

B. "Materially Indistinguishable."

Defendant contends that the present case is "materially indistinguishable" from *Penry I*, Brief for Petitioner 12, yet the argument in support of this contention is just a straight "merits" argument of the kind that would have been appropriate under the now-repealed regime of *de novo* review. See *id.*, at 12-24. Accepting this argument would strip the term "materially indistinguishable" of any meaning. Far worse, it would strip the statute of any meaning and return to the *status quo ante*. It would be precisely the step the Court rejected in *Williams*. See 529 U. S., at 404.

The facts of the present case are more than distinguishable from *Penry I*, and the differences are more than material. The jury in *Penry I* did not receive "*any* jury instruction on mitigating evidence." 492 U. S., at 322 (emphasis added). The jury on retrial did. J. A. 675. One can argue until the cows come home whether the instruction was good enough, but to claim that a case of an arguably ambiguous instruction is "materially indistinguishable" from a case with no instruction at all borders on frivolous.

The two cases are also distinguishable in the arguments of counsel. These arguments are part of the context of the proceedings, and *Boyde* tells us that context is material. See 494 U. S., at 383. In the first trial, the defense asked the jury to answer "no" to a special issue, even if the literal answer was "yes," in response to mitigating evidence. *Penry I*, *supra*, 492 U. S., at 325. The prosecutor argued in rebuttal that they could not, and the *Penry I* Court thought that was significant. See *id.*, at 325-326. In the present case, the prosecutor made the kind of argument upheld as proper in *Boyde*, *i.e.*, that the proffered factors were either not mitigating or entitled to little weight. Compare *Boyde*, 494 U. S., at 385-386, with J. A. 665-666. To say that these are material distinctions would be an understatement. "Material differences exist between this case and [*Penry I*], and the [Texas Court of Criminal Appeals'] decision is not contrary to the rule [*Penry I*] announced." *Ramdass* v.

Angelone, 530 U. S. 156, 147 L. Ed. 2d 125, 137, 120 S. Ct. 2113, 2120 (2000) (plurality opinion).

III. The state court reasonably applied *Penry I* and *Boyde* to the facts of this case.

Under 28 U. S. C. § 2254(d)(1), a federal habeas court may grant relief despite the prior adjudication of the claim "if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Williams* v. *Taylor*, 529 U. S. 362, 407 (2000). Penry seeks to invoke this exception to the general rule of claim preclusion. See Brief for Petitioner 12.

As noted, *supra*, at 10, the state court recognized *Penry* v. *Lynaugh*, 492 U. S. 302 (1989) (*Penry I*) and *Boyde* v. *California*, 494 U. S. 370 (1990) as the controlling precedents. These cases are further clarified in *Johnson* v. *Texas*, 509 U. S. 350 (1993). The crux of the present case is the state court's application of the *Boyde* standard to the instructions given in the second trial. The state court concluded that there was no reasonable probability that the jury understood the instructions to preclude it from giving effect to Penry's mitigating evidence. See *supra*, at 10. Was that conclusion reasonable? If so, that is the end of the case.

A. The Standard.

In *Williams*, the Court distinguished "an *unreasonable* application of federal law" from "an *incorrect* application of federal law." 529 U. S., at 410 (emphasis in original). The term "incorrect" may be appropriate for the tiny handful of cases which reach this Court for decision on the merits. However, *amicus* suggests that a change in terminology is in order, given that the vast majority of cases do not. Questions where the state and lower federal courts disagree are likely to be close questions, "and close questions, by definition, never have clearly correct answers." *Christianson* v. *Colt Industries*

Operating Corp., 486 U. S. 800, 819 (1988). When this Court answers a question, that answer is deemed correct by virtue of the Court's position as the court of last resort. See *Brown* v. *Allen*, 344 U. S. 443, 540 (1953) (Jackson, J., concurring in the result) ("we are infallible only because we are final"). However, when the state court and the lower federal court disagree and this Court denies certiorari, we do not know which is correct and may not find out until years later, if ever. Compare *Dunn* v. *Simmons*, 877 F. 2d 1275, 1279 (CA6 1989), cert. denied, 494 U. S. 1061 (1990) (Kentucky procedure violates "federal standards"), with *Parke* v. *Raley*, 506 U. S. 20, 28 (1992) (same procedure "easily passes constitutional muster"); see also Scheidegger, Habeas Corpus, Relitigation, and the Legislative Power, 98 Colum. L. Rev. 888, 942 (1998). Rather than saying that the habeas court finds that the state court "applied clearly established federal law erroneously or incorrectly," *Williams*, 529 U. S., at 411, it would be better to say, where otherwise appropriate, that the habeas court disagrees with the state court's application.

Disagreement is not enough. Habeas reform was expressly premised on a rejection of the thesis that the federal court resolution of the question is necessarily better. See 141 Cong. Rec. 15,062, col. 2 (1995) (statement of Sen. Hatch); see also S. O'Connor, Local Control of Crime, Address to the Attorney General's Crime Summit 5 (Mar. 4. 1991), reprinted in Habeas Corpus Issues: Hearings before the House Subcommittee on Civil and Constitutional Rights, Serial No. 39, 102d Cong., 1st Sess., 198 (1991). Congress has commanded that the writ not issue for cases within the gray zone of reasonable disagreement. See *Williams*, *supra*, 529 U. S., at 411. The inquiry is objective rather than subjective, *id.*, at 409-411, and hence *Williams* rejected the "all reasonable jurists" standard. Even so, the state court decision would have to be far wide of the mark to be "unreasonable." In *Williams*, for example, there was "an *obvious* failure to consider the totality of the omitted mitigation evidence." 529 U. S., at 416 (O'Connor, J., concurring) (emphasis added). No such failure appears here.

B. The Application.

1. The instructions.

There were several ways to fix the problem in *Penry I*. Another special issue could be added, as the Texas Legislature did later. See Tex. Code Crim. Proc. Art. 37.071 § 2(e)(1). The term "deliberately" in the first special issue could have been defined broadly enough to encompass Penry's mitigation evidence, as *Penry I* indicated would be sufficient. See 492 U. S., at 323. The state is not constitutionally required to provide any particular vehicle, however, so long as it provides *some* method for consideration of the defendant's mitigating evidence. See *Johnson*, *supra*, 509 U. S., at 370. One such method is to supplement the special issue with an instruction telling the jurors to answer "no" to one issue if they conclude on the basis of the mitigating evidence that Penry did not deserve to be sentenced to death, even if the literal answer to the unadorned question would otherwise be yes. *Penry I* held that an argument of counsel precisely to that effect was insufficient "[i]n light of the prosecutor's argument [that they could not do so], and in the absence of appropriate jury instructions . . . ." 492 U. S., at 326. By implication, an appropriate instruction would have been sufficient, and it would have been more than sufficient absent a contrary prosecutor's argument.

In the present case, the jury was told the consequences of its answers to the special issues and then told "your answers . . . should be reflective of your finding as to the personal culpability of the defendant, JOHNNY PAUL PENRY, in this case." J. A. 675. The jury was then instructed to consider all the mitigating evidence, defined in accordance with *Lockett* v. *Ohio*, 438 U. S. 586, 604 (1978) (plurality opinion). See J. A. 675. Then the court instructed, "If you determine, when giving effect to the mitigating evidence, if any, *that a life sentence*, as reflected by a negative finding to the issue under consideration, rather than a death sentence, *is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the special issues*." *Ibid.* (emphasis added).

The plain and obvious meaning of this instruction is to endorse the argument made by counsel at the first trial. It is the "appropriate instruction" that *Penry I* found lacking.

To be sure, supplementing a question with an instruction to answer in a way that does not conform to the bare question is not the optimum way to write instructions. The legitimate question before this Court, however, is not whether the instruction is exemplary, but only whether it meets constitutional minimums. See *Victor* v. *Nebraska*, 511 U. S. 1, 27-28 (1994) (Ginsburg, J., concurring in part and concurring in the judgment). Instructions of this type are not unusual, and nearly all of us have encountered them at some time. Job applicants are commonly asked if they have ever been convicted of a criminal offense, yes or no, followed by instructions directing a negative answer if the offense falls below some threshold of seriousness or age. Even though the answer as directed is different from the answer to the bare question, it seems to present little difficulty.

Indeed, even the essential "reasonable doubt" instruction, given in every criminal jury trial, requires a literally false answer in a sense. If the jury believes the defendant is much more likely guilty than not, yet reasonable doubt exists, they are instructed to pronounce him "not guilty," contrary to what they believe is the truth. This instruction is not only constitutional, it is constitutionally required. See *Sullivan* v. *Louisiana*, 508 U. S. 275, 278 (1993).

A clever enough lawyer can, of course, always find some claimed ambiguity in even the clearest language. *Amicus* National Association of Criminal Defense Lawyers engages in a bizarre parsing of the instruction in a quest for unclarity. NACDL claims that the phrase "at the time" somehow restricts the manner in which the jury can use the mitigating evidence, rather than just designating the time for doing so. Brief for National Association of Criminal Defense Lawyers as *Amicus Curiae* 6 (NACDL Brief). Yet that very sentence unambiguously tells the jury to use the evidence in assessing personal culpability, exactly what *Penry I* requires, see 492 U. S., at 327-

328, and the following sentence expressly tells them to do so by means of a negative finding if they find a life sentence is the appropriate response.

Amicus NACDL goes on to claim that the latter sentence permits the jury to give effect to mitigating evidence "only when mitigation was appropriate 'as reflected by a negative finding to the issue under consideration.' " NACDL Brief 6. That is quite simply *not* what the instruction says. The quoted phrase follows and unambiguously refers to "a life sentence," not to the mitigating evidence, and they had been told only three sentences earlier that the penalty "should be reflective of your finding as to the personal culpability . . . ." J. A. 675.

> "In examining the charge for the purpose of ascertaining its correctness in point of law, the whole scope and bearing of it must be taken together. It is wholly inadmissible to take up single and detached passages, and to decide upon them without attending to the context, or without incorporating such qualifications and explanations as naturally flow from the language of other parts of the charge." *Magniac* v. *Thompson*, 7 Pet. (32 U. S.) 348, 390 (1833) (Story, J.); see *Boyde*, *supra*, 494 U. S., at 378.

Only by the kind of parsing that *Boyde* disapproved, see 494 U. S., at 381, are petitioner and *amicus* NACDL even able to argue that the instructions failed to comply with *Penry I*.

2. "Nullification."

The Texas Court of Criminal Appeals referred to the instruction in question as a "nullification instruction." J. A. 782. This is a poor choice of words, but the court's choice of words does not open an otherwise final judgment to attack. Cf. *Coleman* v. *Thompson*, 501 U. S. 722, 739 (1991).

"Nullification is, by definition, a violation of a juror's oath to apply the law as instructed by the court . . . ." *United States* v. *Thomas*, 116 F. 3d 606, 614 (CA2 1997). That means the whole law, as conveyed by the whole set of instructions. An

instruction to answer a question in a particular way is not a "nullification" instruction, even if the directed answer is different from the answer to the bare question. Jurors who answer according to the full instructions are obeying, not violating, their oaths.

Roberts v. *Louisiana*, 428 U. S. 325 (1976), relied on by petitioner, is inapposite. In that case, the Court rejected an argument that an impermissibly mandatory capital sentencing statute was actually discretionary, because the jury could return a verdict of a lesser degree of murder. See *id.*, at 334-335. In sharp contrast to the present case, the jury was told not to do that, but only to consider the lesser offense if the evidence did not justify conviction of the greater offense. *Id.*, at 334, n. 10. Although the Louisiana jury had discretion in practice, it was a standardless discretion and depended on their willingness "to disregard the trial judge's instructions." *Id.*, at 335.

In the present case, the jurors were given the *Lockett* definition of mitigation and expressly directed to give a negative finding to one of the special issues if they found that, given the mitigation, a life sentence was appropriate. J. A. 675. No disobedience was required to render a life sentence. The jurors chose the death penalty because they believed it was the appropriate sentence, after considering all the evidence.

3. Studies.

Amicus NACDL cites a number of minimally relevant studies that supposedly show juror confusion in capital cases. Such studies should be taken with the greatest skepticism, as they are often driven by a predetermined agenda and not subject to adversarial testing. "Mere citation of a law review to a court does not suffice to introduce into evidence the truth of the hearsay or the so-called scientific conclusions contained within it." *Ramdass* v. *Angelone*, 530 U. S. 156, 147 L. Ed. 2d 125, 139, 120 S. Ct. 2113, 2123 (2000) (plurality opinion); see also *id.*, 147 L. Ed. 2d, at 140, 120 S. Ct., at 2123 (noting interest of sponsor and dubious methodology). It is very easy to manipu-

late methods or analysis to come up with the desired conclusion. For example, the notorious Baldus study of capital sentencing claimed to show a race-of-the-victim bias, but when the case was actually tried the data were found to show, if anything, just the opposite. *McCleskey* v. *Zant*, 580 F. Supp. 338, 367-368 (ND Ga. 1984), aff'd in part, rev'd in part on other grounds, 753 F. 2d 877 (CA11 1985), aff'd, 481 U. S. 279 (1987).

To take just one example from the studies cited by NACDL, we look at the methodology in Haney and Lynch, Comprehending Life or Death Matters, 18 Law and Human Behavior 411 (1994). College students were read the standard California penalty instruction and then asked in the abstract to formulate their own definitions of the terms "aggravation" and "mitigation." *Id.*, at 419. The students' imperfect product in this sterile, artificial context, see *id.*, at 421, should surprise no one. The students did not receive the evidence and argument or participate in the deliberation that *Boyde* found important. See 494 U. S., at 380-381, 383-386. Further, the task they were asked to perform, formulating a definition, is quite different from the task juries perform and not, as the authors claim, simpler. Cf. Haney & Lynch, at 419, n. 6. Defining legal terms is a task our finest legal minds find challenging. The methodology of this study appears calculated to produce a negative result, and that result therefore has little or no meaning.

4. Context.

Applying the *Boyde* rule to the facts of this case requires considering the instruction in the context of the whole trial. See *Boyde*, *supra*, 494 U. S., at 383. The present case is remarkably similar to *Boyde*. The instruction is not erroneous, but it is claimed to be "ambiguous and therefore subject to an erroneous interpretation." *Id.*, at 380. The jury was presented with copious mitigating evidence and told to consider all of it. *Id.*, at 383. Indeed, in the present case, the jury received more complete instruction on mitigation than in *Boyde*, using the

Lockett language. Compare J. A. 675, with *Boyde*, 494 U. S., at 374, n. 1 (factor (k)); and *id.*, at 374, n. 2 (subsequently amended factor (k)). In both cases, defense counsel argued to the jury the interpretation of the instructions that permitted giving effect to all the mitigating evidence. Compare J. A. 640, with 494 U. S., at 386. In both this case and *Boyde*, and in sharp contrast to *Penry I*, the prosecutor did not deny that interpretation but instead argued, entirely properly, that the circumstances were factually unfounded, not mitigating, or entitled to little weight. Compare J. A. 662-664 (abuse unsubstantiated); J. A. 665-666 (retardation mild, not causally related to criminality, not mitigating, brain damage claim unfounded); and *Boyde*, 494 U. S., at 385 (argument that mitigation was minimal, not that it was not a proper factor), with *Penry I*, *supra*, 492 U. S., at 325-326 (urging jurors to stick to the literal questions). In general *voir dire*, the prosecutor expressly endorsed the concept that the jury could answer a question "no" if the mitigating evidence warranted a sentence less than death and stated flatly that determining what was mitigating was up to them, not dictated by the instructions. J. A. 9-10. He then drove the point home during individual *voir dire*, as described in detail in the state's brief. The state court's application of *Boyde* to the facts of this case is eminently reasonable. It is the opposite conclusion, argued by petitioner, that would be unreasonable.

This case is exactly the kind of case Congress had in mind when it acted to limit the second-guessing of state decisions on federal habeas corpus. See 141 Cong. Rec. 15,064, col. 2 (1995) (statement of Sen. Hatch) (purpose of habeas to correct fundamental defects; reasonable application means no fundamental defect). Nothing horrific happened at Penry's trial. There are no confessions beaten out of prisoners, no lynch mob around the courthouse, and no denial of counsel. Cf. *Rose* v. *Lundy*, 455 U. S. 509, 544 (1982) (Stevens, J., dissenting) (proposing limiting collateral review to such fundamental violations). We have a defendant ably represented by counsel who fully presents his mitigating evidence. The prosecution

rebuts firmly but fairly. The trial judge instructs the jury in a careful, conscientious effort to comply both with this Court's complex and constantly changing jurisprudence of the Eighth Amendment and with state law to the extent it is consistent with that jurisprudence. The issue in dispute here raises no question of actual innocence. The argument involves "parsing instructions for subtle shades of meaning." Cf. *Boyde*, *supra*, 494 U. S., at 381. Direct review is enough for such disputes. They do not rise to the level that justifies collateral attack on a final judgment. The state court correctly recognized and reasonably applied this Court's precedents, and that, Congress has decided, ends the case.

IV. The *Estelle* v. *Smith* question under AEDPA is essentially the same as under *Teague*.

Part II of petitioner's brief does not mention 28 U. S. C. § 2254(d) or the cases construing it at all, other than a quotation of the Court of Appeals opinion. See Brief for Petitioner 29. Regardless of which of the exceptions to the general rule of claim preclusion he might invoke, though, none applies. See *supra*, at 9.

What petitioner seeks, in essence, is an extension of the rule of *Estelle* v. *Smith*, 451 U. S. 454 (1981) to a factual setting substantially different from the one in that case. The Texas Court of Criminal Appeals held "*Estelle* is inapplicable to the facts of this case." J. A. 767. That holding was neither contrary to nor an unreasonable application of clearly established law.

Although *Williams* v. *Taylor*, 529 U. S. 362, 407-409 (2000) largely endorsed the interpretation of 28 U. S. C. § 2254(d)(1) in *Green* v. *French*, 143 F. 3d 865, 869-870 (CA4 1998), it neither adopted nor rejected one prong of *Green*. That was *Green*'s assertion "that state court decisions that unreasonably extend a legal principle from our precedent to a new context where it should not apply (or unreasonably refuse to

extend a legal principle to a new context where it should apply) should be analyzed under § 2254(d)(1)'s 'unreasonable application' clause." *Williams*, 529 U. S., at 408. The Court expressly left this question open. *Id.*, at 408-409.

The plurality opinion in *Ramdass* v. *Angelone*, 530 U. S. 156, 147 L. Ed. 2d 125, 135-136, 120 S. Ct. 2113, 2119-2120 (2000) seems to say that *Williams* did accept this prong of *Green*. This is a curious passage. If the opinion is merely summarizing the holding of *Williams*, it is mistaken. A second interpretation is that *Ramdass* went ahead and decided a question *Williams* expressly reserved by simply making a bald statement with no discussion. That seems unlikely. The best interpretation under the circumstances, *amicus* submits, is that the *Ramdass* plurality assumed for the sake of argument that the reserved prong of *Green* was valid and decided the petitioner's claim did not qualify for it. See *id.*, 147 L. Ed. 2d, at 137-138, 120 S. Ct., at 2121. The concurring opinion does not cite or rely on this "unreasonable refusal to extend" test. See *id.*, 147 L. Ed. 2d, at 143-145, 120 S. Ct., at 2126-2128. The question should therefore be regarded as still open.

Amicus CJLF submits that the *Williams* Court's skepticism of this test was well-founded. It is an unnecessary complication of an already complex rule and resolves no issues which cannot be resolved under the other prongs.

Most true "extension" issues are best analyzed under the "clearly established" requirement, where a substantial body of case law already exists. As applied to Supreme Court precedents, "clearly established Federal law" is equivalent to "old rules" under *Teague* v. *Lane*, 489 U. S. 288 (1989). *Williams*, *supra*, 529 U. S., at 412. Conversely, a "new rule" is not "clearly established." "Thus, applying *Teague* principles, 'clearly established federal law as determined by the Supreme Court of the United States' means that the rule sought by petitioner must have been dictated or compelled by" the pertinent Supreme Court precedents. *Harris* v. *Stovall*, 212 F. 3d 940, 944 (CA6 2000).

Much of the *Teague* line of cases deals with extension of existing rules to different situations. *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990) held that extension of the rule of *Edwards* v. *Arizona*, 451 U. S. 477, 485 (1981) to a different offense was a new rule. *Caspari* v. *Bohlen*, 510 U. S. 383, 393 (1994) held that extension of the rule of *Bullington* v. *Missouri*, 451 U. S. 430 (1981) to noncapital cases would be a new rule. *Stringer* v. *Black*, 503 U. S. 222, 228-229 (1992) held that application of the rule of *Godfrey* v. *Georgia*, 446 U. S. 420, 428-429 (1980), on vague death-eligibility circumstances, to a differently worded but substantially equivalent circumstance, was not a new rule. *Lambrix* v. *Singletary*, 520 U. S. 518 (1997) rejected a contention that *Espinosa* v. *Florida*, 505 U. S. 1079 (1992) (*per curiam*) was merely "applying *Godfrey* to Florida's sentencing scheme," see *Lambrix*, 520 U. S., at 542 (Stevens, J., dissenting), rather than a new rule.

Between *Williams*' linkage of *Teague* with "clearly established" and this well-developed body of case law, there is no need for a separate "extension" analysis under the "unreasonable application" clause of § 2254(d)(1). The refusal to extend would only be unreasonable if extension were dictated by precedent, and so the *Teague* case law covers the base. *Williams* involved the unwarranted extension of *Lockhart* v. *Fretwell*, 506 U. S. 364 (1993) to a new context where its rationale did not apply. Part III of Justice O'Connor's opinion, applying the test adopted by a majority in part II, rejects this analysis as contrary to clearly established federal law. See *Williams*, *supra*, 529 U. S., at 413. There is no need to resort to the "unreasonable application" prong for issues of this type.

Petitioner's *Estelle* v. *Smith* claim can be decided under AEDPA the same as it would have been under *Teague*, with the caveat that "clearly established law" is restricted to Supreme Court precedent. See *Williams*, *supra*, 529 U. S., at 412. If the application of the rule of *Estelle* v. *Smith* to these facts was *dictated* by Supreme Court precedent existing in 1995, then the state court decision is contrary to clearly established law and

not protected by § 2254(d)(1). If not, the state court resolution of this issue stands. As we will show in the next part, the present case is so far removed from *Smith* that applying it here would not only be a new rule, it would be a wrong rule.

V. The use of Dr. Peebles' report did not violate *Estelle* v. *Smith*.

Penry claims that the admission of Dr. Peebles' report, along with the District Attorney's references to it at trial, violated *Estelle* v. *Smith*, 451 U. S. 454 (1981), because the report asserted that releasing Penry from custody would be dangerous. See Brief for Petitioner 6, 24. Contrary to Penry's assertion, this does not place *Smith* "in point" with the present case. The *Smith* rule was brought about by "the 'distinct circumstances' of that case, 451 U. S., at 466—the trial judge had ordered, *sua sponte*, the psychiatric examination and Smith neither had asserted an insanity defense nor had offered psychiatric evidence at trial." *Buchanan* v. *Kentucky*, 483 U. S. 402, 422 (1987). *Smith*'s "distinct circumstances" are not present here. Penry's counsel for his prior rape case knew about and approved the examination. Any incriminating statements made during the examination must only have been about the prior rape, a crime for which the defendant's self-incrimination privilege had ended long before the present trial. Penry also raised a mental health issue in the penalty phase, relying in part upon expert testimony to prove his point. This case is thus far beyond the *Smith* rule, which is itself at the outer limits of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). Contrary to the petitioner's claims, *Smith* is not "in point." Cf. Brief for Petitioner 25. It is not even close.

A. Smith's Particular Circumstances.

Since the *Smith* rule was a response to the distinct circumstances of that case, an understanding of the particular facts of that case is essential to the proper application of that decision. First, Smith's competency exam was ordered without his

counsel's knowledge or consent. See *Smith*, *supra*, 451 U. S., at 470-471. Smith therefore had no opportunity to consult with counsel before making a crucial decision about his penalty phase defense. See *id.*, at 471. While this fact was most relevant to the Sixth Amendment portion of *Smith*, see *ibid.*, it also influences the Fifth Amendment analysis. *Smith* is an extension of *Miranda*. See *id.*, at 466-467. *Miranda* is itself premised on the need to combat the compulsion inherent in custodial interrogation where the suspect has not yet been able to consult with counsel. See *Miranda*, *supra*, 384 U. S., at 466. The Fifth Amendment analysis is much different if the suspect may first consult with counsel before the examination. See *infra*, at 25.

A second component of *Smith* is that the defense raised no mental health issues in that case. If the defense raises the issue of the defendant's mental health, then both fairness and accuracy require that the defendant submit to an examination conducted by the prosecution's expert. See *Smith*, *supra*, 451 U. S., at 465-466 (summarizing the treatment of the insanity defense in the federal circuits); *Buchanan*, *supra*, 483 U. S., at 423-424. Just as testimony waives the Fifth Amendment privilege with respect to the subject matter of the testimony, see *Mitchell* v. *United States*, 526 U. S. 314, 321 (1999), so the defendant who places his or her mental health at issue must allow the prosecution a reasonable chance to rebut the defense's case. The only mental health evidence in *Smith* was Dr. Grigson's testimony, see 451 U. S., at 458-460, 466, so there was no Fifth Amendment waiver with respect to Grigson's examination of the defendant.

The last part of the *Smith* mosaic is how the state incriminated the defendant through the competency examination. Dr. Grigson's future dangerousness opinion was based largely upon the account of the crime given by Smith during the competency examination. See *Smith*, *supra*, 451 U. S., at 463-464. When the defendant's description of the crime is used as a basis for his death sentence for that particular crime, the Fifth Amendment is clearly implicated. See *Mitchell*, 526 U. S., at 326. Descriptions of past crimes for which the defendant has already been sentenced do not raise these Fifth Amendment concerns. As *amicus* will demonstrate, none of these factors are present in this case. Therefore, *Smith* does not control.

B. Counsel's Choice.

The first major distinction between *Smith* and the present case is that in this case counsel requested the psychiatric examination that generated Dr. Peebles' report, while in *Smith* the trial court ordered the exam without consulting with counsel. See *Penry* v. *Johnson*, 215 F. 3d 504, 511 (CA5 2000); *Penry* v. *State*, 903 S. W. 2d 715, 759-760 (Tex. Crim. App. 1995); *Smith*, *supra*, 451 U. S., at 470-471. In addition to eliminating any Sixth Amendment claim, see *Buchanan*, *supra*, 483 U. S., at 424-425, this fact also mitigates the need to protect the defendant's self-incrimination privilege through the *Miranda* warnings. Since *Smith*'s Fifth Amendment holding is simply an extension of *Miranda*, see *Smith*, *supra*, 451 U. S., at 469, if the *Miranda* warnings were unnecessary during Dr. Peebles' examination, then *Smith* does not support defendant's Fifth Amendment claim.

The *Miranda* rule is premised upon the inherent compulsion of uncounseled custodial interrogation. See *Miranda*, *supra*, 384 U. S., at 465-466. Counsel plays a vital role in mitigating this pressure in *Miranda*'s scheme. "The rule in *Miranda* . . . was based on this Court's perception that the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation." *Fare* v. *Michael C.*, 442 U. S. 707, 719 (1979). Consultation with counsel before questioning would substantially alleviate the inherent pressures on the suspect that brought about *Miranda*. In the *Smith* context, consultation with counsel can help make the defendant aware of the potential consequences of the examination, and his right not to answer certain questions, as counsel can be trusted

to adequately warn his client. Cf. *Smith*, *supra*, 451 U. S., at 468 (suspect not informed of the potential gravity of the examination). The *Smith* Court sought to prevent the defendant from providing unwitting assistance to the state's case for executing him. See *id.*, at 466. Where the defendant's counsel has requested the psychiatric examination, this threat is minimized.

It is true that consultation with counsel does not by itself satisfy *Miranda* as applied to the interrogation room. Thus, the defendant has the right to have an attorney present during custodial questioning in addition to any prior consultation with counsel. See *Miranda*, *supra*, 384 U. S., at 470. But no similar right exists with respect to psychiatric examinations. In *Smith*, the defendant did not even assert a right to the presence of counsel during his examination. *Smith*, *supra*, 451 U. S., at 470, n. 14. "In fact, the Court of Appeals recognized that 'an attorney present during the psychiatric interview could contribute little and might seriously disrupt the examination.' " *Ibid.* Although this statement addressed the Sixth Amendment right to counsel rather than *Miranda*, and was dictum, the *Miranda* rule does not include a right to counsel's presence during a psychiatric examination. An effective psychiatric examination is impossible so long as a third party like defense counsel is present. Therefore, under *Smith*, consultation with counsel is sufficient.

"The real teaching of *Miranda*, and *Estelle*'s application of it, is not a rigid formula, but that the Fifth Amendment must be protected." *People* v. *Wright*, 430 N. W. 2d 133, 139 (Mich. 1988). When counsel has arranged for the examination, the concerns that prompted the holdings of *Smith* and *Miranda* are abated. The defendant can go into the examination with the complete knowledge of his rights. Cf. *id.*, at 138 (*Smith* distinguished where examination took place "after [defendant] . . . had the assistance of counsel throughout the trial"). Although Penry's counsel in the prior rape case almost certainly did not warn him about the potential use of Dr. Peebles'

conclusions to support a death sentence for some future capital crime, this does not change the analysis. Instead, as the next section demonstrates, the impossibility of predicting the future use of the examination simply underscores the fact that Dr. Peebles' interview with the defendant and his subsequent report did not incriminate Penry.

C. No Incrimination.

Perhaps the most telling difference between this case and *Smith* is that Penry's examination took place before he committed the capital murder that is the subject of the present case. Because Dr. Peebles' examination of him took place to determine his competency to stand trial for a separate, earlier crime, the admission of Dr. Peebles' statement in the 1990 capital murder trial did not violate Penry's self-incrimination privilege.

The *Smith* Court found a violation of the Fifth Amendment privilege because the expert's future dangerousness finding in that case largely relied upon Smith's account of the murder during his examination by Dr. Grigson. See *Smith*, *supra*, 451 U. S., at 464. Thus, while in *Smith* "the ultimate penalty of death was a potential consequence of what respondent told the examining psychiatrist," *id.*, at 462, that was not true at the time Dr. Peebles examined Penry. The examination only threatened Penry's interest after his subsequent rape and murder of Pamela Carpenter. While the self-incrimination privilege may protect the suspect from the ghosts of crimes past and present, it cannot extend to crimes yet to come.

If Penry's Fifth Amendment privilege was violated in this interview, it could only have been with respect to the 1977 rape case for which the examination was conducted. A suspect's privilege against self-incrimination is not eternal. "It is true, as a general rule, that where there can be no further incrimination, there is no basis for the assertion of the privilege. We conclude *that principle applies to the cases in which the sentence has been fixed and the judgment of conviction has become final.*" *Mitchell*, *supra*, 526 U. S., at 326 (emphasis added).

Dr. Peebles' statement was admitted long after Penry had pleaded guilty and been sentenced for the 1977 rape. Although the privilege survives the guilt verdict and extends into the sentencing phase of the trial, *id.*, at 325, it does end after sentencing. Since Penry could no longer be incriminated with respect to the 1977 rape case, admitting Dr. Peebles' report at the trial for the subsequent rape and murder did not violate his Fifth Amendment rights. This report was simply part of Penry's psychological history, just like the school and institutional records routinely considered in such cases.

D. The Complete Picture.

The final major difference between *Smith* and this case is that Penry made his mental state an issue in this case. At the sentencing hearing, the defense called as an expert Dr. Randall Price, a psychologist who testified about "neuropsychology, organic brain damage, mental retardation, and the effects of malingering on various psychological tests." *Penry* v. *State*, *supra*, 903 S. W. 2d, at 763. As part of the basis for his opinion on Penry's mental retardation, Dr. Price relied on Dr. Peebles' report. J. A. 327. Since Penry utilized both mental health expert evidence and Dr. Peebles' report, Texas cannot be faulted for providing the jury with the complete picture of Dr. Peebles' assessment of Penry.

When the defendant "presents psychiatric evidence, then, at the *very least*, the prosecution may rebut this presentation with reports of the examination that the defendant requested." *Buchanan*, *supra*, 483 U. S., at 422-423 (emphasis added). The present case is thus far closer to *Buchanan* than it is to *Smith*. Dr. Peebles' reexamination was done at the request of Penry's counsel, and the report that followed was relied on partly by defendant's psychiatric witness in an attempt to convince the jury that he did not deserve the death penalty because he was mentally retarded. Texas deserved its fair chance to rebut Penry's case.

The fact that the defense's expert only addressed Penry's alleged mental retardation and not his future dangerousness does not change the analysis. While Penry was able to argue that his mental condition made him undeserving of a death sentence, see Part III B, *supra*, the state must also be able to rebut this by arguing that his condition makes him a continuing danger to society. That is the conclusion reached by Dr. Peebles' report. See J. A. 60. Dr. Peebles was tragically right, as Penry raped and murdered Pamela Carpenter only two years after the 1977 rape.[2]

Thus Penry's claim that the Fifth Amendment waiver doctrine did not support admitting Dr. Peebles' report cannot stand. It is true that the act of testifying only waives the self-incrimination privilege with respect to the contents of the testimony. See *Mitchell*, *supra*, 526 U. S., at 321. However, the report cannot be neatly cleaved from Penry's case, since his own expert relied on it, and it helped rebut psychiatric evidence that Penry introduced. "Nice questions will arise" concerning the scope of the initial testimony and whether the cross-examination "are comprehended within its scope . . . ." *Id.*, at 321-322. The waiver issue is at best a "nice question," precisely the kind of question Congress decided to limit to direct review. See *supra*, at 19.

Letting Texas provide the jury with an accurate picture of Penry's mental state is fair. He cannot complain about the state utilizing a report that his own expert relied upon to introduce the issue of his mental retardation. Penry's self-incrimination interest in a report concerning an earlier crime for which he has already served his sentence is remote at best. Furthermore, his need for the *Miranda* warnings before the examination was ameliorated by his counsel's request for the exam. Under these

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2. As the state argues in its brief, admission of the report was surely harmless, even if error. A mere psychiatrist's *prediction* of future dangerousness on top of Penry's *actual*, subsequent acts of rape and murder is like a feather on top of an anvil.

circumstances *Smith* is not controlling, and Penry's Fifth Amendment right was not violated.

The present case is materially distinguishable from *Smith*, and extension of *Smith* to the context of the present case is not dictated by Supreme Court precedent. Therefore, 28 U. S. C. § 2254(d)(1) precludes collateral attack on the final judgment of the Texas Court of Criminal Appeals.

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit should be affirmed.

February, 2001

Respectfully submitted,

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IN THE

Supreme Court of the United States

JOHNNY PAUL PENRY,

Petitioner,

v.

GARY L. JOHNSON, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICUS CURIAE* STATE OF ALABAMA IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

Like *Williams* v. *Taylor*, 529 U.S. 362 (2000), this case involves the construction of the habeas corpus provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") now codified at 28 U.S.C. § 2254(d)(1). The case presents two specific issues:

1. Whether the Texas Court of Criminal Appeals' holding that *Estelle* v. *Smith*, 451 U.S. 454 (1981), does not apply in the circumstances of this case (because the psychiatric examination at issue here was conducted two years *prior* to the offense and thirteen years prior to the pertinent capital murder trial) was "contrary to clearly established Federal law, as determined by [this] Court," or represents an "unreasonable application of[] clearly established Federal law" within the meaning of Section 2254(d)(1).

2. Whether the Texas Court of Criminal Appeals' holding that the instructions given to the jury in the sentencing phase of petitioner's trial, including the supplemental instruction given in response to *Penry* v. *Lynaugh*, 492 U.S. 302 (1989), is "contrary to" any "clearly established Federal law" expressed in that decision, or represents an "unreasonable application" of that decision within the meaning of Section 2254(d)(1).

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INTEREST OF *AMICUS CURIAE*

Amicus Curiae is a state in which the people, through their state legislature, have repeatedly authorized the death penalty for especially heinous crimes. This legislative decision has not been undertaken lightly. Rather, it is based on a firm conviction that capital punishment is the most effective way—perhaps the only way—to protect the state's citizenry from particularly predatory criminals. *Amicus* thus has a strong interest in ensuring that the Antiterrorism and Effective Death Penalty Act of 1996 is allowed to play the role that Congress envisioned, namely, preventing the federal courts, on habeas review, from interfering unduly with a state's efforts to perform this traditional "police power" function in the manner specified by the people's representatives.[1]

INTRODUCTION

Last Term, in *Williams* v. *Taylor*, 529 U.S. 362 (2000), and *(Michael) Williams* v. *Taylor*, 529 U.S. 420 (2000), this Court began the important work of clarifying for the lower federal courts the limits on federal habeas court review of state-court decisions under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). This case provides an opportunity to continue that effort. Here, the Court can make clear the limited circumstances in which a state-court decision can be considered, for purposes of AEDPA, "contrary to" or an "unreasonable application of" a clearly established principle of federal law articulated in a decision of this Court.

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[1] As a state, Alabama is not required to seek leave to file an *amicus curiae* brief. *See* Sup. Ct. R. 37.4. The undersigned counsel alone have authored this brief, and no person or entity other than *amicus* has made a monetary contribution to its preparation or submission. *See* Sup. Ct. R. 37.6.

As the Court has unanimously recognized, in enacting AEDPA "Congress wished to curb delays, to prevent 'retrials' on federal habeas, and to give effect to state convictions to the extent possible under law." *Williams*, 529 U.S. at 386 (opinion of STEVENS, J.); *id.* at 404 (O'CONNOR, J., for majority). Indeed, the legislative history indicates that the statute's habeas provisions were enacted specifically to curb the prior "abuse of the statutory writ of habeas corpus, and to address the acute problem[] of unnecessary delay . . . in capital cases." H.R. Conf. Rep. No. 104-518, at 111 (1996), *reprinted in* 1996 U.S.C.C.A.N. 944, 944; see, *e.g.*, 142 Cong. Rec. S3463 (daily ed. Apr. 17, 1996) (Statement of Sen. Heflin) (AEDPA "contains strong provisions to reform Federal habeas corpus laws—something that is long overdue"). As one Senator put it,

> Finally, the charade of habeas corpus appeals will be reformed: death row inmates will no longer be allowed to drag out their appeals for several decades. I have faith that our State courts respect our constitutional rights, and in the exceptional case where Federal rights have been violated, defendants retain very reasonable access to Federal courts to prove their innocence.

142 Cong. Rec. S3465 (statement of Sen. Warner). In signing the legislation, President Clinton endorsed this view of the problem the Act was meant to solve. President's Statement on Signing the Antiterrorism and Effective Death Penalty Act of 1996, 32 Weekly Comp. Pres. Doc. 720 (Apr. 24, 1996) ("For too long, and in too many cases, endless death row appeals have stood in the way of justice being served.").

At the same time, Congress clearly recognized that the prior abuse of the writ by some federal courts was detrimental, not only to sound criminal-justice policy, but also to the proper relationship between the federal government and the states. See, *e.g.*, 142 Cong. Rec. S3465 (statement of Sen. Warner) ("I have faith that our State courts respect our constitutional rights, and in the exceptional case where Federal rights have

been violated, defendants retain very reasonable access to Federal courts to prove their innocence."). Accordingly, AEDPA was "intended to advance" principles of "comity . . . and federalism" in addition to "finality." *(Michael) Williams*, 529 U.S. at 436.

The specific provision at issue here—28 U.S.C. § 2254(d)(1)—was crafted with these objectives in mind. As the majority noted in *Williams*, Congress viewed this provision "as an important means by which its goals for habeas reform would be achieved." 529 U.S. at 404 (O'CONNOR, J.). This section establishes that, for questions adjudicated on the merits in state court (such as the ones at issue here), federal habeas relief is available *only* if the state court decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). As the majority recognized in *Williams*, this provision thus "places a new constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." 529 U.S. at 412.

The *Williams* Court also clarified the scope of AEDPA by defining the key terms in Section 2254(d)(1). Specifically, the Court determined that a state court decision is "contrary to" clearly established Supreme Court precedent only if the state court "applies a rule that contradicts the governing law set forth in [this Court's] cases" or "decides a case differently than this Court has on a set of materially indistinguishable facts." *Id.* at 405, 413. The Court also opined that a state court's decision involves an "unreasonable application" of federal law if the state court "identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* The Court emphasized that, under this provision, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-

court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411.

The Court did not, however, indicate how it would determine whether the facts of a case are "materially" distinguishable from the facts in a decision of this Court. Nor did the Court reach a holding as to whether an "unreasonable application" of a Supreme Court precedent can be established on the basis of a refusal to extend such a precedent to a new context or, if so, "how such 'extension of legal principle' cases should be treated under § 2254(d)(1)." *Id.* at 408-09. Not surprisingly, the petitioner in this case attempts to establish (if only implicitly) that his claims fit neatly into both of these supposed "exceptions" to Section 2254(d)(1).

This case thus provides an opportunity for the Court to address these two unresolved issues. For reasons explained in detail below, this Court should hold, first, that the facts of a case cannot be considered "materially indistinguishable" from a prior decision of this Court where facts that this Court treated as *significant* in the first case are not present in the subsequent case. This principle should apply even if those facts were not identified as dispositive and, indeed, arguably were not dispositive of the outcome in the prior case.

Second, the Court should hold that a state court's failure to extend to a new context a principle that, by its terms or its logic, is limited to a different context cannot be considered an "unreasonable application" of that principle. This approach should apply, moreover, even if the principle articulated by this Court *could* reasonably be extended to the new context.

These two holdings, which fully dispose of petitioner's claims here, are compelled by AEDPA's language and structure. They are consistent with this Court's earlier pronouncements. And they are necessary to ensure that AEDPA serves its proper role of protecting state criminal-justice systems from over-reaching by lower federal courts.

STATEMENT OF FACTS

To avoid burdening the Court with yet another recitation of the facts pertinent to this case, *amicus* adopt the statement of facts presented in the respondent's brief.

ARGUMENT

The remainder of this brief explains why this case does not fall within the class of cases identified by 28 U.S.C. § 2254(d)(1) for which federal habeas relief is available. This is so notwithstanding petitioner's arguments that the decision of the Texas Court of Criminal Appeals affirming his sentence was both "contrary to" and an "unreasonable application of" this Court's decisions in *Penry* v. *Lynaugh*, 492 U.S. 302 (1989) ("*Penry I*"), and *Estelle* v. *Smith*, 451 U.S. 454 (1981). Because the issues raised by petitioner's *Estelle* claim are of more general application than those raised by his *Penry I* claim, *amicus* will address the *Estelle* claim first.

I. THE TEXAS COURTS' DETERMINATION THAT NO FIFTH AMENDMENT VIOLATION OCCURRED AS A RESULT OF THE ADMISSION, AS REBUTTAL EVIDENCE, OF A PSYCHIATRIC EVALUATION FROM AN UNRELATED CRIMINAL PROSECUTION, DOES NOT WARRANT HABEAS RELIEF UNDER AEDPA.

Petitioner's *Estelle* claim involves a psychiatric report requested by Penry's own defense counsel in an earlier case, regarding a separate crime, and admitted as rebuttal testimony in the punishment phase of Penry's capital trial. In 1977—two years before he raped and killed Pamela Carpenter and thirteen years before the capital murder trial at issue here—Penry underwent a psychiatric examination with Dr. Felix Peebles regarding an unrelated aggravated rape charge. See *Penry* v. *Texas*, 903 S.W.2d 715, 759 (Tex.

Crim. App. 1995). Penry's defense counsel in that case requested the examination. *Id.* Among other things, Dr. Peebles's report "determined that Penry would be dangerous in the future if released." *Penry* v. *Johnson*, 215 F.3d 504, 511 (5th Cir. 2000). Given that it occurred some two years before Carpenter's rape and murder, Dr. Peebles's report contained no testimony from Penry concerning the crime at issue here.

During the punishment phase of Penry's second trial, his counsel introduced testimony about his psychological state. In rebuttal, the State presented the testimony of two psychiatrists who, among other documents, considered Dr. Peebles's 1977 report. Dr. Peebles's report also was admitted into evidence.

On direct review, the Texas Court of Criminal Appeals ultimately determined that the admission of this evidence did not violate the Fifth Amendment under the reasoning of *Estelle*. That is because, at the time Penry made his statement to Dr. Peebles—*i.e.*, during an earlier, unrelated, defense-requested examination—he was not being confronted by an agent of the state. *Penry*, 903 S.W.2d at 759-60 (citing *Estelle*).

Petitioner asserts that the Texas decision is contrary to *Estelle* and falls within Section 2254(d)(1) because the facts of the cases are "materially indistinguishable" and yet Texas reached a different result. Pet. Br. at 13-14; see *Williams*, 529 U.S. at 406. In the alternative, petitioner asserts that the Texas decision is an "unreasonable application" of *Estelle* to the facts of petitioner's case. Pet. Br. at 14; see *Williams*, 529 U.S. at 407-12. As shown below, both claims must fail.

A. The Texas Courts' Decision Cannot Be "Contrary To" *Estelle* v. *Smith* Under A Proper Standard Of Materiality.

The first prong of the AEDPA inquiry requires a federal court to consider whether the state court's decision was

"contrary to" clearly established Supreme Court precedent. In *Williams*, the Court observed that, under the "contrary to" clause of § 2254(d)(1), a federal court may grant a writ of habeas corpus if the state court "decides a case differently than this Court has on a set of materially indistinguishable facts." *Id.* at 413. Without further elaboration, this language threatens to invite, through the back door, the very sort of unfettered, intrusive review of state-court decisions that Congress intended to curtail when it enacted AEDPA. That is because this formulation would seem to leave lower federal courts free to determine *de novo* which factual differences are "material" and which are not.

This risk can be eliminated if this Court adopts an appropriately narrow standard for materiality, namely, whether this Court itself treated as significant in the earlier case a fact that is missing from (or different in) the case at issue. Under this standard, as shown below, the facts pertaining to petitioner's *Estelle* claim are easily distinguished from the facts of *Estelle* itself.

1. The Facts Of Two Cases Should Not Be Considered "Materially Indistinguishable" Where Facts That This Court Treated As Significant In The First Case Are Not Present In The Subsequent Case.

The importance of establishing a standard for materiality can be seen from a simple example. Suppose this Court issues a decision in which, in the course of its analysis (not just in the description of the factual background), it treats four specific facts as having some bearing on the ultimate result (*e.g.*, excluding a particular piece of evidence or finding jury instructions inadequate). Suppose further that the Court does not specify (as it generally does not) which of the various possible subsets of those four facts would be either necessary or sufficient to justify that result.

Now suppose that, in a subsequent habeas case, two of those facts are present, but two are not. If on direct review the state court reaches a result "different" from the result reached by this Court (*i.e.*, not excluding a piece of evidence or finding a jury instruction adequate), the question under *Williams* will of course be whether the absence of the two "missing" facts creates a "material distinction" with this Court's earlier decision.

The problem, of course, is that a federal habeas court's view of whether these distinctions are "material" is likely to be influenced by that court's view of the merits of the underlying issue. If the habeas court agrees with the state court's analysis of the merits, it will likely agree that the distinctions between the case at issue and this Court's earlier decision are material. But if the federal court disagrees with the state court's decision as a *de novo* matter (*i.e.*, it believes the evidence should have been excluded or the jury instruction was inadequate), it likely will believe that the distinctions between the two cases are *not* "material." Thus, if the federal court simply thinks the state court reached the wrong result under this Court's precedent, and if the federal court is allowed an unfettered hand to determine for itself which distinctions are "material," it will usually have little difficulty finding that the state-court decision is "contrary to" the pertinent decision of this Court. Cf., *e.g.*, *United States* v. *Alfaro*, 919 F.2d 962, 964-65 (5th Cir. 1990) (rejecting a "materially untrue" standard because it was "not . . . very helpful" and "confusing"); *Helene Curtis* v. *National Wholesale Liquidators, Inc.* 890 F. Supp. 152, 158 (E.D.N.Y. 1995) ("Materiality is, by its very nature, a subjective concept that is difficult to define."). In that circumstance, moreover, AEDPA's "contrary to" prong is likely to be invoked, routinely, in what are properly viewed as—in the words of Justice O'Connor's opinion in *Williams*—"run-of-the-mill" cases. 529 U.S. at 406.

The solution to this problem is to adopt a standard of "materiality" that leaves somewhat less room for judgment on the part of the federal habeas court, and is therefore less likely to be influenced by the federal court's views of the underlying merits. Such a standard, moreover, is readily available and generally straightforward in its application: The habeas court can simply identify the facts that this Court identified as significant to its decision (including the absence of certain facts). Or, as the Fourth Circuit put it in *Green* v. *French*, 143 F.3d 865, 870 (4th Cir. 1998) (the decision analyzed at length in *Williams*) the habeas court can look to the facts "on the basis of which the precedent was decided." If any of those facts is not present in the subsequent case, that case cannot be said to be "materially indistinguishable" from the earlier decision of this Court. In other words, this Court's prior decision should be allowed to speak for itself, without further interpretation by a federal habeas court.

By affording greater deference to state-court decisions, this approach obviously promotes the values of "comity ... and federalism" that this Court has said underlie AEDPA. *(Michael) Williams*, 529 U.S. at 436. It also reduces the risk that the "contrary to" prong of AEDPA will be routinely invoked to overturn "run-of-the-mill" state-court decisions.

Most important, this approach is far more consistent with AEDPA's language than an approach that allows federal habeas courts a free hand to make determinations about whether the facts in the case before them are "materially indistinguishable" from the facts in a prior decision by this Court. The statutory requirement that a state-court decision be "contrary to . . . clearly established Federal law, as determined by" a decision of this Court, suggests a measure of "deference" to state courts in interpreting and applying the decisions of this Court.[2] And if a federal habeas court has to

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[2] Indeed, the Conference Committee explained that the statute "requires deference to the determinations of state courts that are neither 'contrary

explain why the absence of certain facts that this Court treated as significant to its prior decision is not enough to create a "material" distinction, that by itself will strongly suggest that the state-court decision is not, in fact, "contrary to . . . *clearly* established" federal law.

2. Numerous Facts That This Court Treated As Significant In *Estelle* Are Not Present Here.

With respect to petitioner's *Estelle* claim, this case presents an even stronger situation than the hypothetical example discussed above. *None* of the facts that the Court treated as significant in *Estelle* is present in this case.

First, in *Estelle*, it was the trial court that "informally ordered the state's attorney to arrange a psychiatric examination" to determine the defendant's competency to stand trial. 451 U.S. at 456. This was done "even though defense counsel had not put into issue [defendant's] competency to stand trial or his sanity at the time of the offense." *Id.* at 457 n.1. Moreover, defense counsel apparently did not even discover that this psychiatric examination had occurred until after jury selection began. *Id.* at 458 n.5.

Here, by contrast, petitioner's own defense counsel requested the examination in advance of the petitioner's trial.

Second, in *Estelle*, the psychiatric examination was conducted with regard to the crime at issue and involved details of that crime. Indeed, the psychiatrist "drew his conclusions largely from [defendant's] account of the crime during their interview." *Id.* at 464. Hence, as this Court later observed, the defendant's "communications to the psychiatrist during the examination had become testimonial in nature." *Buchanan* v. *Kentucky*, 483 U.S. 402, 421 (1987).

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to,' nor an 'unreasonable application of,' clearly established federal law." H.R. Conf. Rep. No. 104-518, at 111, *reprinted in* 1996 U.S.C.C.A.N. at 944.

Here, by contrast, petitioner was examined by Dr. Peebles about an entirely separate crime, some two years before he murdered Pamela Carpenter (thereby, ironically, fulfilling Dr. Peebles' prediction of petitioner's future dangerousness). Accordingly, none of Dr. Peebles's conclusions could possibly be based on petitioner's unwitting "testimony" about the instant capital murder case.

Third, *Estelle* involved a significant curtailment of the defendant's freedom and a significant opportunity for the state to dominate the defendant's will. The defendant "was in custody [in jail] when the examination was ordered and when it was conducted," upon the order of the court and with the facilitation of the state's attorney. *Estelle*, 451 U.S. at 467. And defense counsel was not even timely informed about the examination, let alone given an opportunity to consent to it.

Here, by contrast, the psychiatric report resulted from a defense-requested psychiatric examination in an entirely separate case, occurring some two years before the instant crime and some thirteen years before the instant trial. Moreover, there is no indication from the record that the concerns underlying custodial interrogations present in *Estelle* were remotely present for petitioner.

Fourth, in *Estelle*, the defendant introduced no psychiatric evidence, nor had he indicated that he might do so. Rather, the state offered information obtained from the court-ordered competency examination "as affirmative evidence to persuade the jury to return a sentence of guilt." *Id.* at 466.

Here, by contrast, petitioner himself raised the issue of, and introduced testimony about, his psychological state. Dr. Peebles's report came in not as affirmative evidence, but as rebuttal to issues petitioner himself chose to raise.

Accordingly, in every respect that this Court saw fit to mention in *Estelle*, the facts in petitioner's case are readily and materially distinguishable.

B. Texas's Decision Was Not An "Unreasonable Application" Of *Estelle*.

Petitioner also claims, in the alternative, that the Texas courts' application of *Estelle* was "unreasonable." Given the significant distinctions between this case and that one, this argument can only mean that, in petitioners' view, the Texas courts acted unreasonably in refusing the extend the principle articulated in *Estelle* to the very different circumstances of this case.

This argument thus raises the critical issue that was left open in *Williams*, *i.e.*, what standard should be applied in determining whether a state court's decision not to extend a Supreme Court decision to a different factual setting can be deemed "unreasonable." As shown below, such a decision should not be deemed unreasonable when the principle articulated by this Court is, by its own terms or its underlying logic, designed to apply in a different set of circumstances—even if this Court might later conclude (outside of the AEDPA habeas context) that the principle should apply in the new context as well. As shown below, application of this principle squarely forecloses petitioner's "unreasonable application" claim.

1. A State Court's Failure To Extend To A New Context A Principle That By Its Terms Or Its Logic Is Limited To A Different Context Cannot Be Considered An "Unreasonable Application" Of That Principle.

In *Williams*, this Court did not have occasion to develop fully a standard for determining when a state court's extension of (or refusal to extend) this Court's precedent would be considered "unreasonable." 529 U.S. at 408. At the outer limit, the Court stated that it would not go so far as to require that a state court apply federal law "'in a matter that reasonable jurists would *all* agree is unreasonable'" to be considered "unreasonable." *Id.* at 409 (quoting *Green*, 143

F.3d at 870) (emphasis added). Rather, the proper inquiry is "whether that state court's application of clearly established federal law was objectively unreasonable." *Id.*

The Court also cautioned that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law," and characterized this as "the most important point" to remember when applying AEDPA. *Id.* at 410. Under AEDPA, habeas relief is not available simply because a federal habeas court "concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Id.* at 411. "Rather, that application must also be unreasonable." *Id.* Splits of authority among the lower courts are common and do not indicate that either side has been objectively unreasonable, even if this Court ultimately decides that only one position is correct.

The Court left open, however, the question of exactly how "'extension of legal principle' cases should be treated" under AEDPA. *Id.* at 409. *Amicus* believes the Court should adopt the following standard: a state court decision declining to extend to a new context a principle from this Court's precedent is objectively reasonable if that precedent, by its terms or its clear logic, is designed for or limited to a different context. This should be the case, moreover, even if the habeas court believes the Supreme Court precedent *should*, as a *de novo* matter, apply to the new context.[3] Such a standard is warranted for at least three reasons.

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[3] Thus, to determine whether a failure to extend this Court's precedent is unreasonable, the proper inquiry would be: what do the terms and logic of this Court's earlier decision *require*, given the differing facts at issue in the instant case? Obviously, if a case falls squarely within the holding of a prior Supreme Court decision, it would be unreasonable to refuse to extend that decision to the new case. But there may also be situations in which a new case, although not falling squarely within the holding of any prior Supreme Court decision, is unambiguously controlled by the logic of a prior decision or combination of decisions. In that unusual

First, such a rule is necessary to respect the distinction noted in *Williams* between "unreasonable" applications of federal law and those applications that are merely "incorrect." If a state court's refusal to extend to a new context a principle that was developed for or limited to a different context could be said to be "unreasonable," it is hard to imagine any such decisions that would fall into the "merely incorrect" category.

Second, such a rule is also necessary to give effect to the congressional judgment that Section 2254(d)(1) requires some amount of "deference" to state-court interpretations of this Court's decisions. H.R. Conf. Rep. No. 104-518, at 111, *reprinted in* 1996 U.S.C.C.A.N. at 944. If a federal habeas court may treat as "unreasonable" a state court's decision not to extend a principle articulated by this Court to a context for which it was not designed or intended, it is hard to imagine how a federal court could ever find room for deference to the state court's interpretation.

Third, and more generally, the standard suggested here will help to ensure that AEDPA fulfills its purpose of promoting what this Court called the values of "comity . . . and federalism." *(Michael) Williams*, 529 U.S. at 436. As the Court noted, those values require a sense of "mutual respect and common purpose . . . between the States and the federal courts." *Id.* And, as Congress recognized in passing AEDPA, this sense of "mutual respect" requires that federal authorities be "careful to limit the scope of federal intrusion into state criminal adjudications and to safeguard the States' interest in the integrity of their criminal and collateral proceedings." *Id.*

Consistent with these bedrock principles, unless the terms or logic of this Court's precedent compels (or forbids) its extension to another context, it cannot be "unreasonable" within the meaning of AEDPA for a state court to hold that

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circumstance, a failure to follow that logic could also be deemed unreasonable.

such an extension (or refusal) is unwarranted. While this Court may at some point have occasion to address directly the underlying question on the merits, and may then decide for itself whether to extend the existing precedent to the new context, the AEDPA context is not the proper place to correct a mere difference of opinion.

2. By Its Terms And Its Logic, The Exclusionary Principle Articulated In *Estelle* Is Limited To Situations In Which The Defendant Neither Initiates Nor Introduces Psychiatric Evidence.

Under this standard, petitioner's *Estelle* claim cannot satisfy the demands of AEDPA. The terms and logic of *Estelle* expressly limit its holding to the "distinct circumstances" of that case: "A criminal defendant, *who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence*, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." 451 U.S. at 466, 468 (emphasis added). Accordingly, this Court made expressly clear that its holding turned in part on the *absence* of two factual circumstances: a criminal defendant initiating a psychiatric evaluation or introducing psychiatric evidence.

Petitioner's case presents *both* of the factors this Court found notably absent in *Estelle*: (i) petitioner and his counsel initiated the examination (and in an earlier, entirely separate matter) *and* (ii) petitioner put his psychiatric condition at issue in the instant trial and introduced psychiatric evidence. Accordingly, by the terms and logic of *Estelle*'s holding, it is objectively reasonable for the Texas courts to have declined to extend *Estelle* to the very context that the Court expressly distinguished in its opinion.

This is not, of course, to suggest that this Court cannot fully revisit issues it has reserved in one case and decide them in the opposite way upon full consideration in a subsequent case. But where this Court's most relevant precedent expressly

distinguishes certain factual circumstances, it cannot be unreasonable for a state court to hold that where those distinguished circumstances exist, the Court's rule should not be extended.

Petitioner's citation to some lower court cases and a dissent from this Court (to the effect that a defense counsel's initiation of the psychiatric examination does not remove Fifth Amendment concerns) does not render Texas's decision to the contrary "unreasonable" under AEDPA. See Pet. Br. at 35-38; cf. *Williams*, 529 U.S. at 412 (holding that AEDPA "restricts the source of clearly established law to this court's jurisprudence"). Even assuming *arguendo* that every lower court to consider similar facts had gone against Texas, and even if this Court, if considering the matter in a non-AEDPA context, might decide against Texas's conclusion, that alone does not mean that Texas's determination is "unreasonable."

To be sure, the presence of that authority might be useful to help buttress a state court in taking the *contrary* view to Texas's and concluding that, *despite Estelle*'s terms and logic, it was reasonable to extend that decision to a circumstance expressly distinguished by *Estelle*. But the existence of these decisions does not establish that Texas's decision not to extend *Estelle* to this context was unreasonable.[4]

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[4] Even if this Court were to adopt a less deferential standard, the Texas courts' decision is still objectively reasonable. First, this Court has expressly declined to extend *Estelle* to situations in which a defendant places his psychological state at issue and the examination is introduced as rebuttal evidence. *Buchanan* v. *Kentucky*, 483 U.S. 402, 423 (1987). Where, as here, the defendant placed his mental status in issue, this Court found no Fifth Amendment violation in the state presenting rebuttal evidence in the form of "excerpts" from a psychiatric examination where the report did not "describe[] any statements by [the defendant] detailing with the crimes for which he was charged." *Id.* at 423.

Second, petitioner has failed to show any violation of the bedrock principle underlying the Fifth Amendment, that is, that the state must produce evidence against a defendant "'by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his lips.'" *Estelle*, 451 U.S. at 462 (quoting *Culombe* v. *Connecticut*, 367 U.S. 568, 581-82 (1961)). Here, because petitioner's own attorney requested Dr. Peebles' evaluation, Dr. Peebles was not an agent of the state, and the state did nothing to "force" any information from petitioner.

Third, excluding the psychiatric evaluation in circumstances such as these would not serve the deterrence goal that underlies the exclusionary rule. As the Fifth Circuit succinctly explained, at the time Dr. Peebles examined him, "Penry was not yet in custody on the instant capital charge and, thus, could not have been warned about the potential use of his statements at the punishment phase of the capital trial." *Penry* v. *Johnson*, 215 F.3d 504, 511 (5th Cir. 2000). Accordingly, excluding that evaluation would be a pure windfall to petitioner; it would not deter unconstitutional conduct by other state actors.

II. THE TEXAS COURTS' ANALYSIS OF THE JURY INSTRUCTIONS, INCLUDING THE SUPPLEMENTAL INSTRUCTION, DOES NOT WARRANT HABEAS RELIEF UNDER AEDPA.

Petitioners' remaining claim is based on this Court's 1989 decision vacating his first death sentence. There, the Court determined that, "in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background," a death sentence was improper. *Penry I*, 492 U.S. at 308.

In 1990, after retrial before a separate jury, petitioner was again convicted of capital murder and sentenced to death. This time, however, the judge gave a supplemental instruction that explicitly instructed the jury that it must "give effect and consideration" to "any mitigating circumstances" including "any aspect of the defendant's character and record." See *Penry*, 215 F.3d at 508 (quoting the trial court's instruction). The jury was further instructed that, if it determined that a life sentence was appropriate, it should give a negative finding to one of the three Special Issues presented to it. *Id.*

Petitioner challenges these instructions as inadequate under *Penry I*. Once again, he argues that this claim falls within the category of habeas claims cognizable by the federal courts under Section 2254(d)(1) because, according to petitioner, the Texas Court of Criminal Appeals' decision was both "contrary to" and an "unreasonable application of" *Penry I*. And once again, neither of these arguments has merit.

A. The Texas Courts' Analysis Is Not "Contrary To" This Court's Decision In *Penry I* Because This Case Lacks At Least Two Of The Facts That This Court Found Significant There.

As with his *Estelle* claim, petitioner contends that the Texas courts' analysis of the jury instructions in this case is "contrary to" *Penry I* because, in his view, the facts of the two cases are "materially indistinguishable." Pet. Br. at 13-14. Under the standard articulated above, however, this is incorrect because two critical facts that were absent in *Penry I* are present here.

First and foremost, the trial court in this case gave a supplemental instruction that was *not* given in *Penry I*, and that clearly allowed the jury to consider all of the mitigating evidence petitioner wished to present. Whether or not another court might deem this instruction adequate to cure the problem identified in *Penry I* (a subject addressed below), there is no doubt that such an instruction was not given in *Penry I*, and that this Court specifically pointed to the absence of such an instruction in its opinion. 492 U.S. at 328.

Second, during Penry's second trial, his defense counsel, *without* objection from either the court or the prosecution, stated the following during closing argument:

> Let me try to simplify it. If, when you thought about mental retardation and the child abuse, you think that this guy deserves a life sentence, and not a death sentence, decide life in prison is punishment enough, then, you got to answer one of those questions no. The Judge has not told you which question, and you have to give that answer, even if you decide the literally correct answer is yes. Not the easiest instruction to follow, and the law does funny things sometimes, but, it is what it says, and I have taken all this time with you to make sure you understand what it says.

JA 3:640.

The prosecution during petitioner's second trial did not attempt to contradict this statement by petitioner's counsel—a statement that encouraged the jury to treat the supplemental instruction as a kind of "nullification" instruction. *Penry*, 903 S.W.2d at 765. By contrast, in *Penry I*, the prosecution *did* contradict a similar plea when petitioner's counsel made it during his first trial. This Court, moreover, expressly cited that prosecution action in holding that the instructions given during the first trial were inadequate. 492 U.S. at 326.

Whether or not this Court would find these distinctions dispositive if the Court were reviewing the matter *de novo*, there is no doubt that these two facts are "material" in the sense described above. That is, the Court itself treated them as significant (if not dispositive) to the analysis in *Penry I*. This case therefore cannot be considered "materially indistinguishable" from *Penry I*.

B. The Texas Courts' Analysis Is Not An "Unreasonable Application" Of *Penry I*.

Petitioner is also incorrect in contending that the Texas courts "unreasonably applied" *Penry I* to this case. First, contrary to petitioners' suggestions, *Penry I* made no attempt to define the language of a proper instruction, much less to hold that Texas's three Special Issues were invalid regardless of the supplemental instructions that might be given along with them. Second, especially when combined with the unrebutted explanation by petitioner's own counsel, the trial court's supplemental instruction, while perhaps not perfect in every detail, gave the petitioner an adequate opportunity to

have the jury consider his mitigating evidence. Each of these points is elaborated below.

1. *Penry I* Established The Need For A Supplemental Instruction, But Did Not Attempt To Define The Precise Language Of That Instruction.

In *Penry I* the Court did not specify a single, exclusive remedy for the defect it identified. To be sure, the Court's opinion can reasonably be read to suggest that a supplemental instruction on the word "deliberately" in the First Special issue might address some of the concerns raised by the Court. See 492 U.S. at 323. But the opinion did not suggest that such a definition was a necessary or sufficient component of an appropriate supplemental instruction. Thus, the only thing "clearly established" by *Penry I* was the defect—not the remedy.

Certainly, to comply with *Penry I*, the trial court *might* have attempted to define the terms of the Special Issues so as to encompass mitigating evidence of mental retardation and an abused childhood. However, as this Court's careful analysis of the Special Issues in *Penry I* makes clear, the language of the Special Issues does not fully encompass all of the mitigating evidence offered by petitioner. See *id.* at 322-25. And it is doubtful that this language could be defined in a way that would clarify, rather than cloud, the jury's ability to consider and give effect to such evidence. For example, while "deliberately" might be defined to include mental retardation, the inclusion of evidence that the defendant was abused as a child would arguably stretch the definition of the term beyond what it can reasonably bear.

Rather than defining specific terms in a way that might only add to jury confusion, the trial court elected to make explicit the jury's obligation to consider mitigating evidence. To be sure, this may not be a perfect reconciliation of the Texas statutory scheme and the principles established in *Penry I* and

other decisions of this Court such as *Graham* v. *Collins*, 506 U.S. 461 (1993), and *Johnson* v. *Texas*, 509 U.S. 350 (1993)—which is likely an impossible task. But the trial court's effort is certainly a reasonable one, and one that is entitled to deference under the narrow standard of review for habeas petitions established by Congress under AEDPA.

The reasonableness of the state courts' approach is confirmed by petitioner's own argument. A central premise of that argument is that *Penry I* required the trial court to abandon the Special Issues framework altogether. See Pet. Br. at 19 (stating that the trial court erred because it "did not liberate the jury from the confining effect of the three 'special issues'"); see also Brief of American Association of Mental Retardation ("AAMR") *et al.* at 11 ("[T]he trial judge could easily have added a fourth special issue question on mitigation . . . ."). In other words, petitioner and the *amici* AAMR *et al.* argue that the only way the trial court could have remedied the defect identified in *Penry I* was either to ignore or to rewrite the statute completely—a step that the trial court was not at liberty to take.[5]

2. The Supplemental Instruction Adequately Permitted The Jury To Consider And Give Effect To Petitioner's Mitigating Evidence.

The trial court's supplemental instruction, moreover, addressed the Court's concerns in the most direct way possible. In *Penry I*, "[t]he jury was never instructed that it

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[5] The remedy proposed by petitioner was specifically rejected by this Court in *Graham* v. *Collins*, 506 U.S. 461, 476 (1993) (rejecting the notion that the Texas statute must be read to "require in all cases that a fourth 'special issue' be put to the jury"); *see also Johnson* v. *Texas*, 509 U.S. 350, 373 (1993) ("To rule in Petitioner's favor, we should have to require that a jury be instructed in a manner that leaves it free to depart from the special issues in every case. This would, of course, remove all power on the part of the States to structure the consideration of mitigating evidence—a result we have been consistent in rejecting.").

could consider the evidence offered by Penry as mitigating evidence and that it could give mitigating effect to that evidence in imposing sentence." 492 U.S. at 320. By contrast in this case, the jury *was* instructed to "decide how much weight" the mitigating evidence deserved and to "give effect and consideration to them in assessing the defendant's personal culpability." *Penry*, 215 F.3d at 508 (quoting trial court's instruction). It was also told, in essence, that if it believed that those mitigating circumstances justified a life sentence rather than a death sentence, it should issue a negative finding as "to one of the special issues." *Id.*

The approach taken by the trial court is consistent with other decisions of this Court. For example, in *Buchanan* v. *Angelone*, 522 U.S. 269 (1998), this Court approved a jury instruction because it "afforded jurors an opportunity to consider mitigating evidence." 522 U.S. at 277. In *Weeks* v. *Angelone*, the jury received "an explicit direction to consider mitigating evidence." 528 U.S. 225, 233 (2000). Precisely the same sort of instruction was given here:

> [Y]ou are to consider mitigating circumstances, if any, supported by the evidence presented in both phases of the trial, whether presented by the State or the defendant. A mitigating circumstance may include, but is not limited to, any aspect of the defendant's character and record or circumstances of the crime which you believe could make a death sentence inappropriate in this case.

Penry, 215 F.3d at 508.

The approach taken by the trial court also typifies the approach of numerous Texas courts in the wake of *Penry I*. Indeed, the instruction here was based on similar instructions in earlier cases dealing with death sentence challenges that invoked *Penry I*. See, *e.g.*, *Coleman* v. *State*, 881 S.W.2d 344, 356 (Tex. Crim. App. 1994); *Emery* v. *State*, 881 S.W.2d

702, 712 n.16 (Tex. Crim. App. 1994);[6] *Miller* v. *Johnson*, 200 F.3d 274, 289 (5th Cir. 2000) (reviewing a habeas petition in a case where a Texas trial court gave a very similar supplementary instruction).

The instructions given in these cases reflect the reasonable efforts of Texas courts to reconcile *Penry I* with the Texas death penalty scheme. Although the facial validity of the statute had been upheld in *Jurek* v. *Texas*, 428 U.S. 262, 276 (1976), and again in *Franklin* v. *Lynaugh*, 487 U.S. 164, 182 (1988) (plurality opinion), *Penry I* did not explain how a court could instruct a jury to give effect to its "reasoned moral response" (giving the jury discretion to consider a broad range of mitigating evidence) in the context of the Texas statute, which clearly narrowed the mitigating evidence that

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[6] The instruction given is also quoted in *Emery* v. *Johnson*, 139 F.3d 191, 200 (5th Cir. 1997), where the Fifth Circuit, on habeas review, concluded that the instruction comported with the requirements of *Penry I*.

Texas courts considering *Penry I* claims generally have separated cases into those that require a supplemental "*Penry* instruction" and those that do not. If the mitigating evidence relied on by the defendant falls within the scope of the special issues, then no additional instruction is required. *See, e.g.*, *Kemp* v. *State*, 846 S.W.2d 289, 310 (Tex. Crim. App. 1992) ("[A]ppellant was not entitled to a separate *Penry* instruction in order for the jury to give mitigating effect to the evidence he presented at trial."); *Jackson* v. *State*, 822 S.W.2d 18, 23 (Tex. Crim. App. 1990) (appellant's age is relevant to special issue No. 2 (future dangerousness) so no special instruction was necessary); *Ex parte Baldree*, 810 S.W.2d 213, 215 (Tex. Crim. App. 1991) (no additional instruction was necessary for the jury to consider and give effect to evidence of a drug problem, a suicide attempt, and lack of education). On the other hand, if the mitigating evidence does not fall within the scope of the special issues, a separate instruction is required. *See, e.g.*, *Rios* v. *State*, 846 S.W.2d 310, 316-17 (Tex. Crim. App. 1992) (additional instruction that directed the jury to consider all mitigating evidence but only insofar as it created a reasonable doubt as to one of the special issues was inadequate under *Penry I*); *Gribble* v. *State*, 808 S.W.2d 65, 76 (Tex. Crim. App. 1990) (additional instruction should have been given where the defendant offered evidence of a troubled childhood including possible sexual abuse).

the jury could consider to several specific categories. See, *e.g.*, *Trevino* v. *State*, 815 S.W.2d 592, 621 (Tex. Crim. App. 1991) (*en banc*) ("[T]he high Court [in *Penry I*] failed to inform this court how the jury is to give 'mitigating effect' to mitigating evidence that is not capable of being considered outside the special issues."). On its face, the statute simply provides no mechanism to accommodate all of mitigating evidence required by *Penry I*.

To be sure, as this Court and the Texas courts have recognized, the special issues inherently encompass a broad range of mitigating evidence. Thus, even without a supplemental instruction, petitioner's evidence of possible mental retardation has some bearing on the first Special Issue (which requires the jury to consider the "deliberateness" of the act) and the second Special Issue (which requires the jury to consider whether the defendant is likely to pose a continued threat to others).

But in this case, the trial court believed some of the mitigating evidence might not fit comfortably within the three Special Issues. And thus, whatever mitigating effect was left over was fully addressed by the supplemental instruction. Specifically, the jury was told to answer one of the Special Issues in the negative if it believed that the mitigating evidence presented by petitioner warranted a sentence less than death. *Penry*, 215 F.3d at 508. Whether this instruction is viewed as broadening the special issues to cover all of the mitigating evidence presented by petitioner, or as a type of "nullification instruction" (*i.e.*, effectively instructing the jury to disregard the statutory scheme if it finds the mitigating evidence compelling),[7] the instruction clearly corrects the

[7] Although "nullification instruction" may be a misnomer, Texas courts have adopted this term to describe supplemental instructions based on *Penry*. *See, e.g.*, *Coble* v. *State*, 871 S.W.2d 192, 207 (Tex. Crim. App. 1993) ("We have held that a jury nullification charge is sufficient to meet *Penry* requirements.") (citing *San Miguel* v. *State*, 864 S.W.2d 493, 495 (Tex. Crim. App. 1993), and *Fuller* v. *State*, 829 S.W.2d 191, 209 (Tex. Crim. App. 1992)).

flaw identified in *Penry I*. Nor is there any "reasonable likelihood" that the jury was unable to understand or to apply the instruction. *Johnson*, 509 U.S. at 367.

* * * * *

"This is a case about federalism." *Coleman* v. *Thompson*, 501 U.S. 722, 726 (1991). That is because, at bottom, this case "concerns the respect that federal courts owe the States . . . when reviewing the claims of state prisoners in federal habeas corpus." *Id*. The language and history of AEDPA make clear that such respect should be at its zenith when a federal habeas court determines whether a state-court decision is "contrary to" or an "unreasonable application of" a decision by this Court.

CONCLUSION

For these reasons, the decision of the Court of Appeals denying petitioner's motion for a Certificate of Appealability should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2000

JOHNNY PAUL PENRY,

Petitioner,

v.

GARY L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF OF *AMICUS CURIAE* JUSTICE FOR ALL IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

I.

Did an instruction expressly directing sentencing jurors that they should consider "any mitigating circumstances" and "assess[] the defendant's personal culpability" in answering the special issues put to them under Texas law satisfy this Court's directive in *Penry v. Lynaugh* that the jury must be able to give effect to petitioner's mitigating evidence of his mental retardation and abused childhood?

II.

Did it violate petitioner's Fifth Amendment rights for the prosecution to introduce a defense-requested, court-ordered psychiatric evaluation to rebut psychiatric evidence introduced by petitioner?

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STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

Justice for All is an all-volunteer, not for profit Texas corporation founded in 1993. Justice for All is a criminal justice reform organization whose purposes include providing support to the survivors of homicide victims and to the victims of other violent crimes through the challenges they must face on a regular basis, including offering assistance in obtaining victim's compensation, providing community outreach, advising on trial procedures, and assisting in parole and clemency hearings. Justice for All provides education and emotional support to victims throughout the process. In addition, its mission is to act as an advocate for change in the criminal justice system to ensure that the rights of victims and law abiding citizens are recognized and protected without infringing upon the rights of the accused.

This case involves important issues concerning the application of the death penalty in the State of Texas. A decision overturning the court of appeals' ruling could seriously impair the ability of the State to bring convicted murderers to justice with the penalty established under Texas law. As a result, such a decision could further prolong the ordeal of the families of murder victims who seek to bring closure to the traumatic events that have shattered their lives. This Court has recognized that in punishing criminal offenders the State plays a role in vindicating the rights of victims. *See, e.g., Johnson v. Texas*, 509 U.S. 350, 366 (1993). Justice for All has an interest in ensuring that the efforts of the State of Texas to vindicate those rights through the administration of its criminal laws are not unduly hampered.

---

[1] The parties have consented in writing to the filing of this brief in letters that have been submitted to the Clerk. *See* S. Ct. R. 37.3(a). Counsel for a party did not author this brief in whole or in part. *See* S. Ct. R. 37.6. No person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief. *See id.*

STATEMENT OF THE CASE

On October 25, 1979, petitioner brutally raped and murdered 22-year-old Pamela Carpenter in her own home. Petitioner's confessions, later introduced at his trial, revealed that he had decided to go to Ms. Carpenter's house to "get me a piece." J.A. 1:13. Petitioner forced his way into Ms. Carpenter's house, grabbed her by the neck, and held a knife to her throat. Struggling to defend herself, Ms. Carpenter managed to grab a pair of scissors and to stab petitioner. Petitioner, however, knocked the scissors from her hand and overpowered her. He then dragged her to a bedroom. After beating her and – in his own words – "stomping" her,[2] petitioner raped Ms. Carpenter for half an hour. Petitioner then left the room, retrieved the scissors Ms. Carpenter had used in a desperate effort to save herself, and mortally stabbed her in the chest. *See Penry v. State*, 691 S.W.2d 636, 641 (Tex. Crim. App. 1985) (*en banc*). Petitioner then fled.

Ms. Carpenter, however, did not die immediately. She was able to pull the scissors from her chest, struggle to the telephone, and call a friend for help. J.A. 1:15; R.42:130-32. Before she died at the hospital two hours later, she was able to give a description of her attacker. That description led to petitioner's arrest.

Petitioner was tried, convicted of capital murder, and sentenced to death. *See* 691 S.W.2d at 640-41. On federal *habeas corpus* review, this Court vacated petitioner's sentence. *See Penry v. Lynaugh*, 492 U.S. 302 (1989). Under Texas law, petitioner's sentence had been fixed after the jury had answered three "special issues" in the affirmative. The issues asked the jury to evaluate: (1) whether petitioner had acted "deliberately;" (2) whether he would be dangerous in the future; and, (3)

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[2] An autopsy later revealed that a blow from petitioner's boot had ruptured Ms. Carpenter's kidney.

whether his conduct was "unreasonable in response to the provocation, if any, by the deceased." A majority of the Court concluded that, "without any jury instructions on mitigating evidence," *id.* at 322, "we cannot be sure" that the special issues permitted the jury to give mitigating effect to petitioner's particular evidence concerning his mental retardation and abused childhood," *id.* at 323.

Upon resentencing, the court presented the jury with the same special issues. But the court also instructed the jury that, in considering these issues, the jurors were to take into account "any mitigating circumstances," to "give effect and consideration to them in assessing the defendant's personal culpability," and to return a negative finding to a special issue if they concluded that a death sentence was not "an appropriate response to the personal culpability of the defendant." The jury again answered the issues in the affirmative, and petitioner was sentenced to death.

SUMMARY OF ARGUMENT

1. The instructions at petitioner's sentencing fully addressed the constitutional defects identified in *Penry*. The error in petitioner's first sentence was that "in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background," 492 U.S. at 328, the Court could not be sure that the inquiries outlined in the special issues permitted the jury to incorporate petitioner's mitigating evidence into the sentencing decision.

The instruction here addressed that concern directly by telling the jurors that in considering the special issues they were to consider "any mitigating circumstances" and to incorporate into their answers an "assess[ment] [of] the defendant's personal culpability." That instruction defined the scope of the inquiry the jury was properly to undertake and ensured that – particularly in evaluating whether petitioner acted

"deliberately" – the jurors could give a nuanced response that reflected their evaluation of any factors that tended to reduce petitioner's moral culpability. It ensured, in short, that (as the trial court directed) their evaluation of petitioner's "deliberateness" reflected their assessment of whether the death sentence was "an appropriate response to the personal culpability of the defendant." The instruction thus accomplished exactly what *Penry* required: it ensured that the jury was provided a vehicle for giving a "reasoned moral response" to petitioner's mitigating evidence.

2. The introduction at sentencing of a psychiatric evaluation of petitioner conducted while petitioner was in custody on a prior, unrelated charge did not violate petitioner's Fifth Amendment rights. The report was properly introduced under *Buchanan v. Kentucky*, 483 U.S. 402 (1987), as rebuttal to psychiatric evidence introduced by petitioner himself. There is no merit in the claim that use of the report on the subject of future dangerousness was not rebuttal simply because petitioner did not introduce a psychiatric opinion expressly directed to that precise subject. Petitioner put his mental status in issue and sought to establish that his violent behavior was related to his mental retardation and abused background. It was fair rebuttal for the prosecution to use psychiatric evidence to explore another consequence of any link between petitioner's mental status and his violent behavior – namely, his future dangerousness.

In any event, even if there was some error in introducing the report, the error was harmless. The report was merely cumulative of other evidence, including other expert testimony, indicating petitioner's future dangerousness.

ARGUMENT

Under 28 U.S.C. § 2254(d), petitioner may not obtain relief on his claims on federal *habeas* review unless the state ruling he is challenging "was contrary to, or involved and

unreasonable application of, clearly established Federal law." 28 U.S.C. § 2254(d)(1). *See also Williams v. Taylor*, 529 U.S. 362, 405-06 (2000). Petitioner cannot satisfy that standard on any of his claims.

I. THE JURY INSTRUCTION AT PETITIONER'S SENTENCING SATISFIED ALL CONSTITUTIONAL DICTATES, INCLUDING *PENRY*, BY ALLOWING THE JURY TO GIVE EFFECT TO ALL RELEVANT MITIGATING EVIDENCE.

In *Penry v. Lynaugh*, 492 U.S. 302 (1989), the Court overturned petitioner's original death sentence on the ground that the special issues presented to the sentencing jury foreclosed the jury from giving effect to petitioner's mitigating evidence of his mental retardation and abused childhood. The Court concluded that, absent some further instruction from the trial court, there was a reasonable likelihood that the first issue (which inquired into whether petitioner acted "deliberately") would not be understood broadly enough to give effect to petitioner's evidence suggesting his reduced culpability. *See id.* at 322-23. The second issue (which inquired into petitioner's future dangerousness) also provided no vehicle for giving effect to petitioner's particular mitigating evidence, the Court concluded, because petitioner's inability to learn from his mistakes actually tended to suggest that he *would* be dangerous in the future. *See id.* at 323-24. Lastly, the third issue, which directed the jury to consider whether petitioner's conduct was an unreasonable response to provocation, also did not provide an effective mechanism for considering petitioner's evidence because the jury might believe that petitioner's retardation had no bearing on whether he acted reasonably. *See id.* at 324-35. The Court thus concluded that the sentencing court erred by failing to give instructions "informing the jury that it could consider and give effect to the mitigating evidence of Penry's

mental retardation and abused background by declining to impose the death penalty." *Id.* at 328.

As the Court has later explained, it has consistently taken a "limited view of *Penry* and its scope." *Johnson v. Texas*, 509 U.S. 350, 365 (1993). The constitutional infirmity in *Penry* was that, at least without additional instructions from the court, there was a reasonable likelihood that the jury was entirely precluded by the framing of the special issues from incorporating petitioner's particular mitigating evidence into its sentencing decision. As the Court put it in *Graham v. Collins*, 506 U.S. 461 (1993), "the constitutional defect lay in the fact that relevant mitigating evidence was placed beyond the effective reach of the sentencer." *Id.* at 475. Thus, the Court has explained that *Penry* and similar cases "stand *only* for the proposition that a State may not cut off in an absolute manner the presentation of mitigating evidence, either by statute or judicial instruction, or by limiting the inquiries to which it is relevant so severely that the evidence could never be part of the sentencing decision at all." *Johnson*, 509 U.S. at 361(quoting *McKoy v. North Carolina*, 494 U.S. 433, 456 (1990) (Kennedy, J., concurring in judgment)) (emphasis added). *See also Buchanan v. Angelone*, 522 U.S. 269, 276 (1998) ("Our consistent concern has been that restrictions on the jury's sentencing determination not *preclude* the jury from being able to give effect to mitigating evidence." (emphasis added)).

The *Penry* Court never suggested that the Texas special issues focusing the jury's evaluation of the evidence on certain questions were inherently cast in such a way that they could not serve as proper vehicles for addressing Penry's mitigating evidence. To the contrary, the Court repeatedly noted that it was holding solely that the special issues were insufficient "in the absence of appropriate jury instructions." *Penry*, 492 U.S. at 326. *See also id.* at 322 (special issues inadequate "without any jury instructions on mitigating evidence"); *id.* at 328 (issues inadequate "in the absence of instructions informing the

jury that it could consider and give effect to . . . mitigating evidence"). And *Penry* certainly did not abandon the fundamental principle, reaffirmed just last Term, that "the State may structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to it." *Weeks v. Angelone*, 528 U.S. 225, 232 (2000).

The jury instruction given in this case fully addressed the constitutional error identified in *Penry*. After setting out the special issues that the jury was to consider, the Court instructed the jury as follows:

> You are . . . instructed that your answers to the special issues, which determine the punishment to be assessed the defendant by the court, *should be reflective of your finding as to the personal culpability of the defendant*, Johnny Paul Penry, in this case.
>
> If you find that there are any mitigating circumstances in this case, you must decide how much weight they deserve, if any, and therefore, give effect and consideration to them in assessing the defendant's personal culpability at the time you answer the special issue. If you determine, when giving effect to the mitigating evidence, if any, that a life sentence, as reflected by a negative finding to the issue under consideration, rather than a death sentence, is an appropriate response to the personal culpability of the defendant, a negative finding should be given to one of the three special questions.

J.A. 3:676-77 (emphasis added).

The Court has made clear that the standard for determining whether these instructions satisfy constitutional demands is "'whether there is a reasonable likelihood that the

jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.'" *Weeks*, 528 U.S. at 232 (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)). In applying that standard, moreover, the Court has rejected a "technical parsing of th[e] language of the instructions," and instead "approach[es] the instructions in the same way that the jury would – with a 'commonsense understanding of the instructions in light of all that has taken place at the trial.'" *Johnson*, 509 U.S. at 368 (quoting *Boyde*, 494 U.S. at 381).

Under that standard, it is plain that the court's instruction permitted the jury to give full effect to petitioner's mitigating evidence. The court made clear that the jury was to take into account "any mitigating circumstances" in an "assess[ment] [of] the defendant's personal culpability" and to incorporate that assessment into its consideration of the special issues. Indeed, the court directed the jurors expressly that the answers to the special issues "should be reflective of your finding as to the personal culpability of the defendant."

That instruction necessarily shaped the jurors' understanding of the nature of the inquiry they were being asked to pursue in answering the issues – and in particular in determining whether petitioner acted "deliberately." It made it clear that the inquiry under the first special issue was to be a broad-ranging one that took into account any circumstances that bore on petitioner's moral responsibility for the crime. After all, the commonsense understanding of the question whether petitioner acted "deliberately" would, without more, include some evaluation of whether petitioner acted with a considered understanding of the consequences of his actions.[3]

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[3] *Cf. Merriam Webster's Collegiate Dictionary* 305 (10th ed. 1994) (defining "deliberate" as "characterized by or resulting from careful and thorough consideration" and "characterized by awareness of the (continued...)

In everyday usage, the actions of a person who has a reduced comprehension of the consequences of his conduct (a child, for example) would usually not be called "deliberate." And when the direction to assess whether petitioner acted "deliberately" was combined with a further instruction to use "any mitigating circumstances" to evaluate the petitioner's "personal culpability" in answering that question, it is plain that the question was broad enough to allow the jury to consider and give effect to petitioner's mitigating evidence in responding to the first special issue.

The trial court's instruction thus directly responded to the constitutional defect identified in *Penry*. As the *Penry* Court explained, the infirmity it found was that, without a further instruction "clearly direct[ing] the jury to consider fully Penry's mitigating evidence as it bears on his personal culpability," the Court could not "be sure that the jury was able to give effect to the mitigating evidence" in the framework of the special issues. 492 U.S. at 323. The instruction here directed the jury precisely to take into account all mitigating evidence in an assessment of petitioner's "personal culpability" as it considered whether or not he acted "deliberately." That fully satisfied *Penry*'s dictates.

It bears emphasizing, moreover, that the Court has long recognized that a "commonsense understanding" of the Texas special issues must acknowledge that the issues – even without the additional instruction given here – required jurors "to 'exercise a range of judgment and discretion.'" *Johnson*, 509 U.S. at 370 (quoting *Adams v. Texas*, 448 U.S. 38, 46 (1980)). As the Court stressed in *Johnson*, "we cannot forget that 'a Texas capital jury deliberating over the Special Issues is aware of the consequences of its answers, and is likely to weigh mitigating evidence as it formulates these answers in a manner

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[3] (...continued)
consequences").

similar to that employed by capital juries in 'pure balancing' States.'" *Id.* at 370-71 (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 182 n.12 (1988) (plurality opinion)).

Especially when the special issues were supplemented with an express instruction requiring the jury to incorporate an assessment of the defendant's culpability into its consideration of whether the defendant acted "deliberately," it is clear that the instruction as a whole permitted the jury to give a nuanced response to the first special issue – a response that would fully take into account factors that might reduce petitioner's moral culpability. In short, the jury was directed to do precisely what *Penry* required – namely, provide a "reasoned moral response," 492 U.S. at 328, to petitioner's mitigating evidence in rendering its sentencing decision. Thus, it cannot be said that there is a "reasonable likelihood" that jurors believed they were precluded from giving effect to petitioner's evidence.[4]

Petitioner's claims that the instruction failed to cure the defects in his sentencing are meritless. First, petitioner focuses on language from *Penry* suggesting that the constitutional defect in the original sentence could be cured by an instruction giving a broad definition to the term "deliberately" in the first special issue. *See* 492 U.S. at 323. From there, petitioner makes a wholly unwarranted logical leap to insist that without an instruction expressly addressing that particular term, the use of the special issues in his resentencing was unconstitutional. Contrary to petitioner's claims, however, nothing in *Penry* remotely suggested that the *only* constitutionally permissible way to solve the infirmity in the first special issue was to give the jury a specific instruction on the meaning of the term "deliberately." The defect was that, absent some further

[4] *Cf. Weeks v. Angelone*, 528 U.S. 225, 236 (2000) (explaining that a "slight possibility that the jury considered itself precluded from considering mitigating evidence" is "insufficient to prove a constitutional violation under *Boyde*").

instruction from the trial court, a reviewing court could not "be sure that the jury's answer to the first special issue reflected a 'reasoned moral response' to Penry's mitigating evidence." 492 U.S. at 323. As explained above, by explicitly directing the jury to incorporate consideration of petitioner's "personal culpability" based on "any mitigating circumstances" into its assessment of whether petitioner acted "deliberately," the trial court directly responded to that concern. An express definition of the term "deliberately" itself thus bore no talismanic significance for resolving the constitutional concerns identified in *Penry*.

Next, petitioner seizes on the fact that the Texas Court of Criminal Appeals described the instruction given here as a "nullification" instruction and claims that the instruction was infirm because it allowed the jury to give effect to his mitigating evidence only by returning a "false" answer to one of the special issues – that is, by answering "no" to a special issue even if the jurors believed that the true response to the question asked was "yes." Pet'r Br. 22-27. Petitioner, however, paints this picture of a conflict between the "correct" response to the issues and a "no" answer from the jury only by *assuming* an unduly narrow conception of the inquiry permitted by the special issues. In effect, he portrays the special issue asking whether the defendant acted "deliberately" as amounting to little more than an inquiry into whether petitioner acted with volition and motor control over his actions in committing the crime. But a "commonsense understanding of the instructions in light of all that has taken place at the trial," *Boyde*, 494 U.S. at 381, readily shows that this assumption is wholly misplaced.

To begin with, as noted above, even without the additional instruction given in this case, the Court has recognized that a jury considering the special issues ""is likely to weigh mitigating evidence as it formulates [its] answers in a manner similar to that employed by capital juries in 'pure balancing' States.'" *Johnson*, 509 U.S. at 370-71 (quoting

Franklin, 487 U.S. at 182 n.12 (plurality opinion)). *See also Lockhart v. McCree*, 476 U.S. 162, 183 (1986) (noting (approvingly) that the Texas system, "although purporting to limit the jury's role to answering several 'factual' questions, in reality vested the jury with considerable discretion over the punishment to be imposed on the defendant"). Indeed, even one of the staunchest opponents of the death penalty on this Court recognized that the Texas special issues did not constrain the jury to merely providing a technical answer to a narrow factual question. Rather, as the Court noted in *Johnson*, 509 U.S. at 371, Justice Brennan's dissent for four Justices in *Blystone v. Pennsylvania*, 494 U.S. 299 (1990), described the Texas system as one permitting the sentencing jury to exercise judgment – specifically by demanding an evaluation of the "deliberateness" of the defendant's actions. Thus, Justice Brennan noted that the special issues "require the jury to do more than find facts supporting a legislatively defined aggravating circumstance. Instead, by focusing on the deliberateness of the defendant's actions and his future dangerousness, the questions compel the jury to make a moral judgment about the severity of the crime and the defendant's culpability." *Id.* at 322 (Brennan, J., dissenting).

The narrow conception of the "deliberateness" inquiry that underpins petitioner's claims is thus rather dubious even as a matter of this Court's traditional understanding of the Texas special issues. The additional instruction given in this case makes it even plainer that the inquiry into whether petitioner acted "deliberately" cannot be understood as narrowly as petitioner would like. As explained above, the court's direction to the jurors to consider "any mitigating circumstances" and "assess[] the defendant's personal culpability" in answering the issue necessarily shaped the scope of the proper inquiry the jurors were instructed to undertake. Essentially, the jurors were told to determine whether petitioner acted with sufficient deliberation that a death sentence would be "an appropriate

response to [his] personal culpability." Far from requiring the jurors to *depart* from their oath to render a true verdict on the special issues in order to give effect to petitioner's mitigating evidence, the instruction defined the inquiry before the jurors in such a way as to ensure that it would include full consideration of that evidence. Thus, an observation the Court has made in the past is particularly apt here: juries answering the special issues can "exercise a range of judgment and discretion *while remaining true to their instructions and their oaths.*" *Adams v. Texas*, 448 U.S. 38, 46 (1980) (emphasis added).

Petitioner's premise that jurors likely felt constrained to limit their evaluation of whether petitioner acted "deliberately" effectively to whether he acted "intentionally" is thus baseless. In light of the whole instruction there is no reason to think that reasonable jurors would feel restricted to a narrow conception of "deliberation" that would eliminate all the discretion that the court's express instruction so plainly gave them. Petitioner's effort to manufacture a purported conflict between the jurors' oath to render a true verdict on the issues and their ability to give effect to his mitigating evidence is thus entirely meritless.

Underlying petitioner's arguments is really an appeal to a much broader principle. Petitioner points to language from *Penry* suggesting that his mitigating evidence had "relevance to his moral culpability beyond the scope of the special verdict question." *Penry*, 492 U.S. at 322. Ultimately, petitioner's position rests on the proposition that, even if the instructions in this case did not *foreclose* the jury from giving effect to his mitigating evidence, restricting the manner in which the jury could consider the evidence by channeling it through the framework of the special issues was still improper. The error, in other words, was that the special issues constrained the consideration of petitioner's evidence at all, or, as petitioner puts it, the instruction here was unconstitutional because "[i]t

did not liberate the jury from the confining effect of the three 'special issues.'" Pet'r Br. 19.

That is a proposition, however, that has been specifically and repeatedly rejected by this Court. Responding to similar arguments in *Johnson*, the Court noted that accepting such a principle would require a sea change in the Court's jurisprudence. "Instead of requiring that a jury be able to consider in some manner all of a defendant's relevant mitigating evidence, the rule would require that a jury be able to give effect to mitigating evidence in every conceivable manner in which the evidence might be relevant." *Johnson*, 509 U.S. at 372. To do that would require overruling *Jurek v. Texas*, 428 U.S. 262 (1976), the decision that originally upheld the Texas system of structuring the evaluation of mitigating evidence through the special issues, and would mean abandoning the fundamental proposition that it is permissible for the State to guide a jury's evaluation of matters presented in mitigation. As the Court concluded in *Johnson*, the principle petitioner advances would "remove all power on the part of the States to structure the consideration of mitigating evidence – a result we have been consistent in rejecting." *Johnson*, 509 U.S. at 373.[5]

At bottom, petitioner's arguments do not rest so much on an application of this Court's precedents as on an emotional appeal. It was largely in response to this Court's decision in petitioner's own case, petitioner claims, that Texas modified the sentencing procedure for capital cases in 1991. The new procedure adds an additional special issue that expressly allows

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[5] *See also Franklin v. Lynaugh*, 487 U.S. 164, 181 (1988) (plurality opinion) ("[T]his Court has never held that jury discretion must be unlimited or unguided; we have never suggested that jury consideration of mitigating evidence must be undirected or unfocused; we have never concluded that States cannot channel jury discretion in capital sentencing in an effort to achieve a more rational and equitable administration of the death penalty.").

the jury virtually unchanneled discretion to decline to impose the death penalty based on its evaluation of mitigating evidence.[6] It would be a cruel irony, petitioner suggests, if, "while all Texas capital defendants now have the benefit of a 'Penry' question, Penry himself [were] deprived of such a question." Pet'r Br. 6. *See also* Br. of Amicus Nat'l Ass'n of Crim. Defense Lawyers 4-5.

The problem with this argument is that the new special issue Texas has adopted simply is not *required* by the federal Constitution. Indeed, in *Johnson*, the Court explicitly rejected the proposition that the sentencing jury must be instructed in a way that allows it to give effect to mitigating evidence in any manner it chooses and thus, in effect, "to depart from the special issues in every case." 509 U.S. at 373. *See also Graham v. Collins*, 506 U.S. 461, 476-77 (1993). As noted above, this Court has consistently held that "there is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" *Boyde v. California*, 494 U.S. 370, 377 (1990) (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 181 (1988) (plurality opinion)). And even as recently as last Term the Court reaffirmed the principle that "the State may structure the jury's consideration of mitigation so long as it does not *preclude* the jury from giving effect to it." *Weeks*, 528 U.S. at 232 (emphasis added).

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[6] The new procedure instructs the jury to consider "[w]hether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed." Tex. Crim. Proc. Code Ann. art. 37.071 § 2(e)(1) (Vernon Supp. 1992).

Here, as explained above, the jury was fully able to give effect to all of petitioner's mitigating evidence through its consideration of the special issues. The mere fact that Texas now provides sentencing juries in capital cases even wider discretion to give effect to mitigating evidence through the use of an additional question does not make petitioner's sentence constitutionally infirm. And it certainly does not make the instruction given in his case an "unreasonable application" of the law existing at the time of his sentencing.

II. THE INTRODUCTION AT SENTENCING OF PSYCHOLOGICAL EVIDENCE FROM A PRIOR COMPETENCY EVALUATION DID NOT VIOLATE PETITIONER'S FIFTH AMENDMENT RIGHTS.[7]

A. The Peebles Report Was Properly Admitted As Rebuttal Evidence Under *Buchanan v. Kentucky*.

Petitioner goes to great lengths in an effort to establish that, when the prosecution introduced the report that resulted from Dr. Peebles' un-*Mirandized* examination of petitioner, Dr. Peebles could properly be considered an "agent of the State." As a result, petitioner claims, the protections of the Fifth Amendment under *Estelle v. Smith*, 451 U.S. 454 (1981), should apply. *See* Pet'r Br. 29-40. But petitioner's narrow focus on whether Dr. Peebles was an agent of the State, and thus whether his examination of petitioner broadly came within the ambit of Fifth Amendment protections, is largely beside the point for the simple reason that the report was properly

[7] Petitioner does not raise a Sixth Amendment claim, probably because Dr. Peebles' examination was conducted at petitioner's counsel's request. *See Penry v. State*, 903 S.W.2d 715, 759 (Tex. Crim. App.), *cert. denied*, 516 U.S. 977 (1995).

admitted as rebuttal evidence under *Buchanan v. Kentucky*, 483 U.S. 402 (1987).

In *Buchanan*, the Court explained one of the limitations inherent in its holding in *Estelle*:

> [I]f a defendant requests such [a psychiatric] evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution.

483 U.S. at 422-23. As the Court later explained, *Buchanan* "held that the defendant waived his Fifth Amendment privilege by raising a mental-status defense." *Powell v. Texas*, 492 U.S. 680, 685 (1989). *Buchanan* thus recognizes the principle that a defendant who puts his mental status at issue and presents psychological evidence should not be permitted to appeal to the Fifth Amendment to block rebuttal evidence in the form of psychiatric reports – even if the examinations underlying the reports were conducted in a manner that in other circumstances might allow the defendant to raise a Fifth Amendment claim. *See Schneider v. Lynaugh*, 835 F.2d 570, 575-76 (5th Cir.), *cert. denied*, 488 U.S. 831(1988). As the Fifth Circuit explained, "[i]t is unfair and improper to allow a defendant to introduce favorable psychological testimony and then prevent the prosecution from resorting to the most effective and in most instances the only means of rebuttal: other psychological testimony." *Id.* at 576.

Petitioner undisputedly presented psychiatric testimony and evidence concerning his mental status in putting on his case. Through his expert, Dr. Price, he sought to establish that his violent behavior was attributable to his mental retardation and background of childhood abuse. Thus, Dr. Price testified

that, in his opinion, "the extent of mental retardation and brain impairment are substantial factors in the development of anti-social behavior in Johnny Paul Penry," J.A. 2:414, and that "brain impairment of this type, causes the person problems in areas such as . . . impulse control." *Id.* at 279. Petitioner sought to use this evidence concerning his mental status and its effect in reducing his control over his violent behavior to argue that he bore reduced culpability for his actions. In response, the prosecution relied on the Peebles report to emphasize another aspect of the mental characteristics petitioner's expert had stressed and their effect on petitioner's violence – namely, that petitioner was likely to be violent in the future.

The claim that this use of the report was not proper rebuttal is baseless. According to petitioner, the Peebles report could not be rebuttal because petitioner did not present psychiatric evidence directed precisely at addressing the issue of future dangerousness. *See* Pet'r Br. 41. But that attempts to parse the issues far too narrowly. Petitioner put on evidence concerning his mental status and the effect that his mental impairments had on his violent behavior. It was certainly fair rebuttal for the State to point out that the very same conditions on which petitioner was basing his arguments – and which petitioner himself was linking to his violent behavior – also had relevance to whether petitioner would be dangerous in the future. In short, simply because petitioner did not want to use his psychological evidence to argue to the jury specifically concerning future dangerousness does not mean that the State must be barred from using psychiatric evidence to address that issue when the evidence was plainly relevant to the same subject on which petitioner's expert had testified – namely, the nexus between petitioner's retardation and abused background and his violent conduct.

Petitioner also overlooks the fact that the Peebles report was admitted into evidence on cross examination of petitioner's own expert, Dr. Price, after he testified that he had relied on the

report in forming his opinions. *See* J.A. 2:327, 345-47. If the principle announced in *Buchanan v. Kentucky* is to make any sense, then it surely is broad enough to ensure that, where the defendant puts on his own psychiatric expert and that expert relies for his opinions on a report from an earlier examination of the defendant (even if that examination took place in an un-*Mirandized* custodial setting), the full report can be introduced into evidence upon cross examination and used by the State. Any other result would suggest a rule that would undermine the proper functioning of the adversary system as a search for truth. It would suggest that a defendant could have his expert selectively pick and choose portions of a document on which to base his opinions and could then appeal to the Fifth Amendment to shield any unfavorable aspects of the very same report from the jury's view. Such a result simply is not dictated by the Fifth Amendment or *Estelle v. Smith*.

B. Even If There Was Some Error In Admitting the Peebles Report, the Error Was Harmless.

A trial-type error such as the purported Fifth Amendment violation that petitioner assigns to the introduction of the Peebles report is subject to harmless error review. *See, e.g.*, *Chapman v. California*, 386 U.S. 18 (1967). On collateral review, moreover, the *Chapman* standard for harmless error review (under which error must be proved harmless "beyond a reasonable doubt") does not apply. Rather, on federal *habeas* review, the test for harmlessness is whether the error "'had substantial and injurious effect or influence in determining the jury's verdict,'" *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)), which requires that the error must have resulted in "'actual prejudice.'" *Id.* (citing *United States v. Lane*, 474 U.S. 438, 449 (1986)). In this case, even if the introduction of the Peebles report at sentencing was error, it was harmless under the *Brecht* standard.

Petitioner focuses his attack entirely on the statement in the Peebles report "that if Johnnie Paul Penry were released from custody . . . he would be dangerous to other persons." J.A. 1:60. According to petitioner, that statement had a devastating impact on the jury's consideration of the second special issue.

The Peebles report, however, was merely cumulative evidence on the subject of petitioner's dangerousness. To begin with, the jury could readily infer from petitioner's criminal record and the heinous and brutal nature of this crime that he would continue to be dangerous in the future. Petitioner, after all, had only recently been released from jail on a prior rape charge when he committed the attack at issue here. The jury also had before it evidence of petitioner's particularly callous attitude toward the crime in his confessions. The Peebles report, moreover, was not the only expert evidence that addressed petitioner's dangerousness. As the court of appeals noted, the prosecution also introduced the testimony of Dr. Quijano, who concluded that petitioner "had an antisocial personality disorder which made him more likely to be violent in the future." 215 F.3d at 511. Indeed, petitioner's *own expert*, Dr. Price, admitted upon cross examination that, if petitioner "was in the free world, I would consider him dangerous." J.A. 2:392. If any evidence presented to the jury amounted to a "devastating statement about Penry's dangerousness," Pet'r Br. 42, surely it was that condemnation from the mouth of Penry's own expert.

When the jury had all of these other sources of evidence to draw upon clearly suggesting petitioner's future dangerousness, it simply cannot be said that the single statement in the Peebles report "substantial[ly] . . . influenced" the jury's verdict. *Brecht*, 507 U.S. at 637. Thus, even if it was error to admit the report, the error was harmless.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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